Peter H. Klee, State Bar No. 111707
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

Attorneys for Defendant Allstate Indemnity Company

FILED
08 SEP -5 AM 10:57
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: DEPUTY

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ORALIA MARTINEZ, Plaintiff, v. ALLSTATE INDEMNITY COMPANY, Defendant.	Case No. '08 CV 1630 BTM RBB **NOTICE OF REMOVAL OF CIVIL ACTION**

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, pursuant to 28 U.S.C. Sections 1441(a) and 1446, defendant Allstate Indemnity Company ("Allstate") hereby removes this action from the Superior Court of the State of California for the County of San Diego, Central Division, and submits the following statement of facts, which entitles it to removal:

///

///

///

///

///

1. On April 11, 2008, an action was commenced against Allstate in the Superior Court of the State of California, for the County of San Diego, South Branch, entitled ORALIA MARTINEZ v. ALLSTATE INDEMNITY COMPANY, Superior Court Case No. 37-2008-00069884-CU-IC-SC, by the filing of a complaint on that date. Allstate was served with a copy of the complaint and summons on or about April 23, 2008. (Complaint, Exhibit A.) The case was subsequently transferred to the Superior Court of the State of California, County of San Diego, Central Division, Case No. 37-2008-00069884-CU-IC-CTL. Allstate filed its Answer to the complaint on September 4, 2009. (Answer, Exhibit B.)

2. Allstate is informed and believes that the named plaintiff is, and was at the commencement of the state court action and at the time of removal, a resident and citizen of the State of California, as well as the United States. There is no indication that plaintiff is or was a citizen of Illinois, the only fact that would destroy diversity of citizenship in this case.

3. Allstate is and was at the commencement of the state court action a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Cook County, Illinois, and is and was at the commencement of the state court action and at the time of removal a resident and citizen of the state of Illinois, as well as the United States.

4. Disregarding all the "Doe" defendants, the only remaining defendant is Allstate. Complete diversity exists between Allstate and the plaintiff, Oralia Martinez.

5. This action is civil action for damages for breach of insurance contract, breach of the implied covenant of good faith and fair dealing, ufair claim settlement practices, injunctive relief, and improper disclosure of confidential information arising from the theft of plaintiff's 2004 GMC automobile in Tijuana, Mexico on or about October 20, 2006.

6. The face of the complaint was silent as to the amount in controversy. Therefore, Allstate could not determine whether the amount in controversy exceeded

$75,000. Plaintiff alleges to have suffered damages as a result of Allstate's handling of his claim (Complaint ¶ 15, **Exhibit A**), but did not state a specific amount of damages in the complaint.

7. Within the last 30 days, on August 28, 2008, Defendant received a Statement of Damages from which it could first be ascertained that the case is one which has become removable. (Statement of Damages, **Exhibit C**).

8. Based on plaintiff's Statement of Damages, plaintiff has suffered "$1,000,000 representing the amount of the judgment in excess of policy limits," "approximately $45,000 for the value of the 2004 GMC automobile and loss of use," and "approximately $50,000 for past and future personal medical and related expenses." (Statement of Damages, **Exhibit C**) Plaintiff also seeks the following damages:

a. "Pain, suffering, and emotional distress in the amount of $100,000." (Statement of Damages, **Exhibit C**). Emotional distress damages are included in determining the amount in controversy. Angus v. Shiley, Inc., 989 F.2d 142, 146 (3d Cir. 1993); Aucina v. Amoco Oil Co., 871 F.Supp. 332, 334 (S.D. Iowa 1994); Richmond v. Allstate Ins. Co., 897 F.Supp. 447 (S.D. Cal. 1995)

b. "Exemplary and punitive damages in the amount of $1,000,000." (Statement of Damages, **Exhibit C**) Punitive damages are included in determining whether the amount in controversy requirement has been met. Green v. Party City Corporation, 2002 U.S. Dist. Lexis 7750; Bell v. Preferred Life Society, 320 U.S. 238, 240, 64 S.Ct. 5, 6 (1943); Richmond v. Allstate Ins. Co., 897 F.Supp. 447 (S.D. Cal. 1995); Physicians Health Plan v. Citizens Ins. Co., 673 F. Supp. 903, 910 (W.D. Mich. 1987); Dembrowski v. Allstate Ins. Co., 1992 U.S. Dist. LEXIS 3282 (E.D. Pa. 1992).

c. Attorneys' fees. (Statement of Damages, **Exhibit C**). A claim for attorneys' fees is also included in determining the amount in controversy. Goldberg v. CPC Int'l, Inc., 678 F. 2d 1365 (9th Cir. 1982).

9. Based upon the foregoing, this action is a civil action over which this court has original jurisdiction under the provisions of 28 U.S.C. Section 1332, and is one which

may be removed to this court by Defendant pursuant to the provisions of 28 U.S.C. Section 1441(a), in that it is a civil action wherein the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and is between citizens of different states.

10. Copies of all pleadings which have been filed in the state court action are attached hereto as **Exhibit D**.

WHEREFORE, Allstate prays that the state court action now pending against it in the Superior Court of the State of California for the County of San Diego, Central Division, be removed therefrom to this United States District Court for the Southern District of California.

DATED: September 5, 2008 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: [signature]
John D. Edson
Attorneys for Defendant
Allstate Insurance Company

101115409.1

EXHIBIT A

J. Manuel Sanchez, Esq. State Bar No. 74994
J. MANUEL SANCHEZ & ASSOCIATES
Attorneys at Law
482 W. San Ysidro Boulevard, Suite 3
San Ysidro, California 92173
Tel: (619) 662-2080
Fax: (619) 662-2048

Attorneys for Plaintiff Oralia Martinez

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SOUTH COUNTY JUDICIAL DISTRICT

ORALIA MARTINEZ, Plaintiff, v. ALLSTATE INDEMNITY COMPANY, DOES 1 through 50, inclusive, Defendants.	CASE NO. ~~CIS~~ COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT, BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, UNFAIR CLAIM SETTLEMENT PRACTICES, INJUNCTIVE RELIEF, AND IMPROPER DISCLOSURE OF CONFIDENTIAL INFORMATION [UNLIMITED JURISDICTION] (Amount demanded exceeds $25,000)

Plaintiff Oralia Martinez alleges:

I

PARTIES

1. Plaintiff Oralia Martinez is now a resident of the County of San Diego, State of California.

2. Defendant ALLSTATE INDEMNITY COMPANY [ALLSTATE], is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California and authorized to transact, and transacting, business in California, as an automobile liability insurer.

3. Defendant ALLSTATE, is now, and at all times alleged in this complaint, has been, an insurer that is authorized to issue and deliver policies of insurance in the State of California.

4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 50, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged proximately were caused by their conduct.

5. Plaintiff is informed and believes and thereon alleges that at all times alleged in this complaint, Defendants, and each of them, were the agents, servants, and employees of each of the other defendants, and in committing the alleged acts, were acting within the course and scope of their employment and with the permission and consent of the other co-defendants.

II

COMMON ALLEGATIONS

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint as though fully set forth herein.

6. On or about September 19, 2004, Plaintiff purchased a policy of automobile insurance from Defendants, and each of them, bearing policy number 627 540 781, with effective dates of coverage of September 19, 2004. The policy was subsequently renewed with effective dates, which included coverage through the date of the loss of October 20, 2006, and subsequently thereafter, and at all times relevant to this action. A true and accurate copy of said policy of insurance is attached to this complaint as Exhibit "A."

7. Plaintiff is informed and believes, and thereon alleges, that said policy of insurance was delivered by Defendants to Plaintiff in the State of California and that all premiums for the policy were paid in California.

8. Plaintiff Oralia Martinez is the named insured under said policy of insurance for losses suffered as a result of a covered risk occurring during the time at which the policy was in force.

9. The policy contained coverage against loss due to theft or larceny of an automobile.

10. On or about October 20, 2006, at approximately 1:00 p.m. Plaintiff parked and secured her 2004 GMC automobile on Toribio Ortega street outside her place of employment in

Tijuana, Mexico. When Plaintiff returned to her automobile at approximately 5:30 p.m. of that same day, Plaintiff discovered that her automobile had been stolen from where it was parked, all to Plaintiff's loss in the amount according to proof at the time of trial.

11. On or about October 20, 2006, at approximately 7:00 p.m., Plaintiff contacted the police department in Tijuana, Mexico, and reported the theft of her automobile. A true and accurate copy of said Police Report is attached to this complaint as Exhibit "B." Plaintiff attempted to file a report with the California Highway Patrol, but was informed by the California Highway Patrol that no further report was required.

12. On or about October 20, 2006, soon after the theft of her automobile, Plaintiff placed a telephone call from Tijuana, Mexico to ALLSTATE to report the theft of her automobile, and was informed that the report had been recorded and that she would be contacted by ALLSTATE for additional information.

13. On October 26, 2006, Defendant ALLSTATE was further notified of Plaintiff's claim, in the form of an Affidavit of Vehicle Theft, in the manner set forth in said policy of insurance, by submitting a written notification of the claim, and proof of loss, by mailing said claim to Defendants, and each of them. A true and accurate copy of said Affidavit of Vehicle is attached to this complaint as Exhibit "C." Subsequently thereto, Defendants acknowledged receipt of notification by sending a letter denying coverage to Plaintiff, dated May 17, 2007. A true and accurate copy of said letter denying coverage is attached hereto as Exhibit "D."

14. On or about January of 2007, Defendant ALLSTATE's agent, employee and attorney Richard O. Knapp of Knapp & Spurlock, LLP contacted Plaintiff via telephone, and informed Plaintiff that he was going to assist her in resolving her property claim, and requested that Plaintiff appear for a deposition, and that Plaintiff bring to the deposition, confidential bank statements and other bank records. Richard O. Knapp of Knapp & Spurlock, LLP led Plaintiff to believe that he was assisting Plaintiff with her property claim, and therefore, Plaintiff believed that she had a special and fiduciary relationship with Mr. Knapp, such that it was proper to comply with Mr. Knapp's request for the release of her confidential bank records.

15. Plaintiff is informed and believes and thereon alleges that Defendants, and each of

them, failed to conduct a prompt full and complete investigation of the facts and circumstances giving rise to the claims asserted in the notification of the claim and proof of loss. Subsequently, the Defendants, and each of them, denied coverage for the claim.

16. Plaintiff is informed and believes and thereon alleges that the Defendants, and each of them, failed and refused to:

A. Conduct a proper, full and complete investigation of the claim in addition to those matters asserted in the notification of claim and supported by the proof of loss, submitted by Plaintiff to Defendants;

B. Conduct a further investigation after rejecting the claim and being advised by Plaintiff that Defendants had failed to conduct a complete investigation and that further information was available into the circumstances giving rise to the claim;

C. Advise Plaintiff in a timely manner of the status of the claim and the need for further information and additional time to investigate and respond to Plaintiff's claim; and

D. Promptly respond to communications with respect to the claim.

17. If Defendants had fulfilled their obligations as set forth in paragraphs 14 through 17 above, Defendants would have learned the following facts:

E. That Plaintiff's automobile was stolen;

F. That the witnesses did not identify Plaintiff's sons as the persons who committed the theft of Plaintiff's automobile;

G. That Plaintiff's automobile was not stolen by her sons;

H. That Plaintiff had absolutely no involvement in the theft of her automobile;

I. That Plaintiff did not in any way contribute to the theft of her automobile; and

J. That Plaintiff fully complied with the requirements under the policy.

K. Defendant ALLSTATE's agent, employee and attorney Richard O. Knapp of Knapp & Spurlock, LLP improperly and wrongfully requested confidential information from Plaintiff, including records pertaining to Plaintiff's bank statements and other financial records.

///

///

III

FIRST CAUSE OF ACTION
(Breach of Contract)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint and Paragraphs 6 through 17 of the Common Allegations of this Complaint as though fully set forth herein.

18. Plaintiff has duly performed each and every condition and obligation of the policy of insurance issued by Defendants as required to be performed by Plaintiff.

19. Plaintiff paid all premiums due under the policy, submitted all proofs of loss required under the policy, and performed all other conditions the policy required her to perform.

20. Defendants, and each of them, failed and refused to perform their obligations under the policy in that they failed and refused to conduct a full and complete investigation of the claim, and refused to pay the benefits owing under the policy.

21. As a direct and proximate result of the breach by Defendants, and each of them, of their contractual duties, Plaintiff has incurred fees and costs in the loss of use of her automobile.

IV

SECOND CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, and Paragraphs 18 through 21 of the First Cause of Action of this Complaint as though fully set forth herein.

22. Defendants, and each of them, at all times had a duty to act fairly and in good faith to Plaintiff in carrying out its responsibilities under the policy of insurance.

23. Implicit in the duty of Defendants' obligation was to act fairly and in good faith with Plaintiff, and promptly investigate claims brought by it's insured and to make reasonable decisions.

24. Defendants breached the duty to act fairly and in good faith toward Plaintiff by:

A. Refusing to conduct further investigation after being informed that the initial information was incomplete and inaccurate;

B. Denying Plaintiff the coverage and benefits owing under the policy of insurance without regard to the provisions of the policy and the obligations imposed upon Defendants;

C. Basing its decision on coverage upon its desire to reduce or avoid its obligations to Plaintiff under the policy;

D. Denying Plaintiff's claim with the intention of coercing Plaintiff to forgo the benefits due under the policy;

E. False Accusations against Plaintiff with the intent to intimidate Plaintiff;

F. Delay in resolving the claim;

G. Forcing Plaintiff to Seek Legal Redress; and

H. Allowing ALLSTATE attorneys to take the depositions of Plaintiff and her husband without providing Plaintiff and her husband with their own attorneys, and improperly and wrongfully acquiring confidential information from Plaintiff.

25. As a direct and proximate result of Defendants' breach, Plaintiff has suffered damages consisting of costs and fees associated with the loss of her automobile.

26. As a further direct and proximate result of Defendants' breach, Plaintiff has incurred the attorney fees and costs necessary to obtain the benefits and rights to which she is entitled under the policy but which Defendants refused and failed to provide.

27. As a further direct and proximate result of Defendants' breach, Plaintiff has suffered, and continues to suffer, emotional and mental distress.

28. In committing the alleged acts, Defendants acted with oppression, fraud and malice. All of the alleged acts were performed or ratified by Defendants' managerial employees, who acted with knowledge that Defendants' conduct would cause Plaintiff harm. Plaintiff is therefore entitled to recover punitive damages in an amount according to proof at trial.

V

THIRD CAUSE OF ACTION
(Unfair Claims Settlement Practices)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, Paragraphs 18 through

21 of the First Cause of Action of this Complaint, and Paragraphs 22 through 28 of the Second Cause of Action of this Complaint as though fully set forth herein.

29. Defendants are engaged in the business of insurance in the State of California, and the policy was issued and delivered by Defendants to Plaintiff in the State of California.

30. Defendants committed the acts referred to above knowingly and as part of a general business practice of:

A. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

B. Failing to adopt and implement reasonable standards for the prompt investigation of claims;

C. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

D. Failing to affirm or deny coverage of claims within a reasonable time after investigation has been completed;

E. Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which the investigation has become reasonably clear;

G. Compelling insureds to institute litigation to recover amounts due under insurance policies by refusing to pay under the policy when the investigation has become reasonably clear;

H. Delaying the investigation or payment of claims by requiring the insured to submit to a preliminary claim report and then requiring the insured to submit to further interrogation, both containing substantially the same information;

I. Allowing ALLSTATE attorneys to take the depositions of Plaintiff and her husband without providing Plaintiff and her husband with their own attorneys;

31. These acts constitute violations of the Fair Claims Settlement Practices Regulations.

32. As a result of Defendants' violations, Plaintiff was deprived of payment under the policy, lost use of her automobile, and suffered emotional distress in an amount according to proof.

///

VI

FOURTH CAUSE OF ACTION
(Injunctive Relief and Restitution)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, Paragraphs 18 through 21 of the First Cause of Action of this Complaint, Paragraphs 22 through 28 of the Second Cause of Action of this Complaint and Paragraphs 29 through 32 of the Third Cause of Action of this Complaint as though fully set forth herein.

33. Plaintiff is informed and believes that Defendants, and each of them, have engaged in and continue to engage in unlawful claims practices as alleged in paragraphs 1 through 31 above.

34. Plaintiff is informed and believes and thereon alleges that the insured of Defendants have been denied coverage and will continue to be denied coverage due to the unlawful claims practices of Defendants, and each of them.

35. Plaintiff is informed and believes and thereon alleges that no adequate remedy at law lies for Defendants' continuing violations.

VII

FIFTH CAUSE OF ACTION
(Improper Disclosure of Confidential Information)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, Paragraphs 18 through 21 of the First Cause of Action of this Complaint, Paragraphs 22 through 28 of the Second Cause of Action of this Complaint, Paragraphs 29 through 32 of the Third Cause of Action of this Complaint, and Paragraphs 33 through 35 of the Fourth Cause of Action of this Complaint as though fully set forth herein.

36. Plaintiff is informed and believes that at all times herein mentioned, Richard O. Knapp of Knapp & Spurlock, LLP was an agent, employee and attorney of Defendant ALLSTATE.

37. On or about January of 2007, Defendant ALLSTATE's agent, employee and attorney Richard O. Knapp of Knapp & Spurlock, LLP contacted Plaintiff via telephone and requested

that Plaintiff bring her confidential bank statements and other bank records to a deposition to be taken by Mr. Richard O. Knapp. Mr. Knapp misrepresented that he was going to assist Plaintiff with her property claim, lead Plaintiff to believe that she had a special and fiduciary relationship with Mr. Knapp, and improperly and wrongfully requested and acquired confidential bank records from Plaintiff. Plaintiff would not have released her confidential bank statements and other bank records to Mr. Knapp had she known that Defendant ALLSTATE's agent and employee Richard O. Knapp of Knapp & Spurlock, LLP was not her attorney, and was not representing her, or assisting her with her property claim.

38. As a result of Defendants ALLSTATE and their agents and employees, Defendants have in their possession certain confidential bank information concerning Plaintiff, to wit: bank statements and other financial records.

39. The improper and wrongful request for confidential bank records and the disclosure of the aforementioned bank records, unless enjoined and restrained by order of this court, will cause great and irreparable injury to Plaintiff in that if the information is further disclosed it will not be possible to restore its confidentiality.

40. Plaintiff has no adequate remedy at law for the injuries set forth herein because monetary damages cannot fully compensate Plaintiff for the invasion of her privacy that has been caused by the disclosure of the confidential information by Defendants, and each of them.

41. As a proximate result of Defendants' improper and wrongful disclosure of the aforementioned bank records and other conduct as mentioned above, Plaintiff has sustained damages according to proof.

42. As a further direct and proximate result of Defendants' improper and wrongful disclosure of confidential information, Plaintiff has incurred the attorney fees and costs.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

1. For damages in the sum according to proof for breach of contract;

2. For general and compensatory damages including, but limited to, injuries resulting from humiliation, mental anguish and emotional distress sum according to proof;

3. For attorneys' fees incurred in obtaining policy benefits, as provided by law;

4. For prejudgment interest in an amount to be proven at trial;

5. For Punitive and exemplary damages;

6. For a permanent injunction under the Fourth Cause of Action enjoining Defendants, their agents, successors and employees from unlawful claims practices, and under the Fifth Cause of Action enjoining Defendants, their agents, successors and employees from further disclosing and using Plaintiff's confidential bank records;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

Dated: April 11, 2008

J. Manuel Sanchez & Associates

By: ______________________
J. Manuel Sanchez, Esq.
Attorneys for Plaintiff
Oralia Martinez

(CITACIÓN JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED
SOUTH COUNTY
2008 APR 11 PM 3:
SAN DIEGO COUNTY

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
ALLSTATE INDEMNITY COMPANY, DOES 1 through 50, inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
ORALIA MARTINEZ

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.
There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia. Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CASE NUMBER: *(Número del Caso):* 37-2008-00069884-CU-IC-SC

- ☐ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827
- ☐ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081-6643
- ☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941
- ☐ RAMONA BRANCH 1428 MONTECITO RD., RAMONA CA 92065-5200
- ☒ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649
- ☐ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
J. MANUEL SANCHEZ, ESQ. (619) 662-2080
J. MANUEL SANCHEZ & ASSOCIATES
482 W. San Ysidro Blvd., Suite 3
San Ysidro, CA 92173

DATE: *(Fecha)* APR 11 2008

CLERK OF THE SUPERIOR COURT
Clerk, by *(Secretario)* R. DIAZ, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons (form POS-010))
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify)*:
3. ☐ on behalf of *(specify)*:

under ☒ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (individual)
☐ other *(specify)*:

4. ☐ by personal delivery on *(date)*:

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 [Rev. January 1, 2004]
SDSC CIV-219(Rev. 1-04)

SUMMONS

Code of Civil Procedure §§ 412.20, 465

American LegalNet, Inc.
www.USCourtForms.com

J. Manuel Sanchez, Esq. State Bar No. 74994
J. MANUEL SANCHEZ & ASSOCIATES
Attorneys at Law
482 W. San Ysidro Boulevard, Suite 3
San Ysidro, California 92173
Tel: (619) 662-2080
Fax: (619) 662-2048

Attorneys for Plaintiff Oralia Martinez

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SOUTH COUNTY JUDICIAL DISTRICT

ORALIA MARTINEZ, Plaintiff, v. ALLSTATE INDEMNITY COMPANY, DOES 1 through 50, inclusive, Defendants.	CASE NO. ~~GIS~~ COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT, BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, UNFAIR CLAIM SETTLEMENT PRACTICES, INJUNCTIVE RELIEF, AND IMPROPER DISCLOSURE OF CONFIDENTIAL INFORMATION [UNLIMITED JURISDICTION] (Amount demanded exceeds $25,000)

Plaintiff Oralia Martinez alleges:

I

PARTIES

1. Plaintiff Oralia Martinez is now a resident of the County of San Diego, State of California.

2. Defendant ALLSTATE INDEMNITY COMPANY [ALLSTATE], is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California and authorized to transact, and transacting, business in California, as an automobile liability insurer.

3. Defendant ALLSTATE, is now, and at all times alleged in this complaint, has been, an insurer that is authorized to issue and deliver policies of insurance in the State of California.

4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 50, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged proximately were caused by their conduct.

5. Plaintiff is informed and believes and thereon alleges that at all times alleged in this complaint, Defendants, and each of them, were the agents, servants, and employees of each of the other defendants, and in committing the alleged acts, were acting within the course and scope of their employment and with the permission and consent of the other co-defendants.

II

COMMON ALLEGATIONS

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint as though fully set forth herein.

6. On or about September 19, 2004, Plaintiff purchased a policy of automobile insurance from Defendants, and each of them, bearing policy number 627 540 781, with effective dates of coverage of September 19, 2004. The policy was subsequently renewed with effective dates, which included coverage through the date of the loss of October 20, 2006, and subsequently thereafter, and at all times relevant to this action. A true and accurate copy of said policy of insurance is attached to this complaint as Exhibit "A."

7. Plaintiff is informed and believes, and thereon alleges, that said policy of insurance was delivered by Defendants to Plaintiff in the State of California and that all premiums for the policy were paid in California.

8. Plaintiff Oralia Martinez is the named insured under said policy of insurance for losses suffered as a result of a covered risk occurring during the time at which the policy was in force.

9. The policy contained coverage against loss due to theft or larceny of an automobile.

10. On or about October 20, 2006, at approximately 1:00 p.m. Plaintiff parked and secured her 2004 GMC automobile on Toribio Ortega street outside her place of employment in

Tijuana, Mexico. When Plaintiff returned to her automobile at approximately 5:30 p.m. of that same day, Plaintiff discovered that her automobile had been stolen from where it was parked, all to Plaintiff's loss in the amount according to proof at the time of trial.

11. On or about October 20, 2006, at approximately 7:00 p.m., Plaintiff contacted the police department in Tijuana, Mexico, and reported the theft of her automobile. A true and accurate copy of said Police Report is attached to this complaint as Exhibit "B." Plaintiff attempted to file a report with the California Highway Patrol, but was informed by the California Highway Patrol that no further report was required.

12. On or about October 20, 2006, soon after the theft of her automobile, Plaintiff placed a telephone call from Tijuana, Mexico to ALLSTATE to report the theft of her automobile, and was informed that the report had been recorded and that she would be contacted by ALLSTATE for additional information.

13. On October 26, 2006, Defendant ALLSTATE was further notified of Plaintiff's claim, in the form of an Affidavit of Vehicle Theft, in the manner set forth in said policy of insurance, by submitting a written notification of the claim, and proof of loss, by mailing said claim to Defendants, and each of them. A true and accurate copy of said Affidavit of Vehicle is attached to this complaint as Exhibit "C." Subsequently thereto, Defendants acknowledged receipt of notification by sending a letter denying coverage to Plaintiff, dated May 17, 2007. A true and accurate copy of said letter denying coverage is attached hereto as Exhibit "D."

14. On or about January of 2007, Defendant ALLSTATE's agent, employee and attorney Richard O. Knapp of Knapp & Spurlock, LLP contacted Plaintiff via telephone, and informed Plaintiff that he was going to assist her in resolving her property claim, and requested that Plaintiff appear for a deposition, and that Plaintiff bring to the deposition, confidential bank statements and other bank records. Richard O. Knapp of Knapp & Spurlock, LLP led Plaintiff to believe that he was assisting Plaintiff with her property claim, and therefore, Plaintiff believed that she had a special and fiduciary relationship with Mr. Knapp, such that it was proper to comply with Mr. Knapp's request for the release of her confidential bank records.

15. Plaintiff is informed and believes and thereon alleges that Defendants, and each of

them, failed to conduct a prompt full and complete investigation of the facts and circumstances giving rise to the claims asserted in the notification of the claim and proof of loss. Subsequently, the Defendants, and each of them, denied coverage for the claim.

16. Plaintiff is informed and believes and thereon alleges that the Defendants, and each of them, failed and refused to:

A. Conduct a proper, full and complete investigation of the claim in addition to those matters asserted in the notification of claim and supported by the proof of loss, submitted by Plaintiff to Defendants;

B. Conduct a further investigation after rejecting the claim and being advised by Plaintiff that Defendants had failed to conduct a complete investigation and that further information was available into the circumstances giving rise to the claim;

C. Advise Plaintiff in a timely manner of the status of the claim and the need for further information and additional time to investigate and respond to Plaintiff's claim; and

D. Promptly respond to communications with respect to the claim.

17. If Defendants had fulfilled their obligations as set forth in paragraphs 14 through 17 above, Defendants would have learned the following facts:

E. That Plaintiff's automobile was stolen;

F. That the witnesses did not identify Plaintiff's sons as the persons who committed the theft of Plaintiff's automobile;

G. That Plaintiff's automobile was not stolen by her sons;

H. That Plaintiff had absolutely no involvement in the theft of her automobile;

I. That Plaintiff did not in any way contribute to the theft of her automobile; and

J. That Plaintiff fully complied with the requirements under the policy.

K. Defendant ALLSTATE's agent, employee and attorney Richard O. Knapp of Knapp & Spurlock, LLP improperly and wrongfully requested confidential information from Plaintiff, including records pertaining to Plaintiff's bank statements and other financial records.

///

///

III

FIRST CAUSE OF ACTION
(Breach of Contract)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint and Paragraphs 6 through 17 of the Common Allegations of this Complaint as though fully set forth herein.

18. Plaintiff has duly performed each and every condition and obligation of the policy of insurance issued by Defendants as required to be performed by Plaintiff.

19. Plaintiff paid all premiums due under the policy, submitted all proofs of loss required under the policy, and performed all other conditions the policy required her to perform.

20. Defendants, and each of them, failed and refused to perform their obligations under the policy in that they failed and refused to conduct a full and complete investigation of the claim, and refused to pay the benefits owing under the policy.

21. As a direct and proximate result of the breach by Defendants, and each of them, of their contractual duties, Plaintiff has incurred fees and costs in the loss of use of her automobile.

IV

SECOND CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, and Paragraphs 18 through 21 of the First Cause of Action of this Complaint as though fully set forth herein.

22. Defendants, and each of them, at all times had a duty to act fairly and in good faith to Plaintiff in carrying out its responsibilities under the policy of insurance.

23. Implicit in the duty of Defendants' obligation was to act fairly and in good faith with Plaintiff, and promptly investigate claims brought by it's insured and to make reasonable decisions.

24. Defendants breached the duty to act fairly and in good faith toward Plaintiff by:

A. Refusing to conduct further investigation after being informed that the initial information was incomplete and inaccurate;

B. Denying Plaintiff the coverage and benefits owing under the policy of insurance without regard to the provisions of the policy and the obligations imposed upon Defendants;

C. Basing its decision on coverage upon its desire to reduce or avoid its obligations to Plaintiff under the policy;

D. Denying Plaintiff's claim with the intention of coercing Plaintiff to forgo the benefits due under the policy;

E. False Accusations against Plaintiff with the intent to intimidate Plaintiff;

F. Delay in resolving the claim;

G. Forcing Plaintiff to Seek Legal Redress; and

H. Allowing ALLSTATE attorneys to take the depositions of Plaintiff and her husband without providing Plaintiff and her husband with their own attorneys, and improperly and wrongfully acquiring confidential information from Plaintiff.

25. As a direct and proximate result of Defendants' breach, Plaintiff has suffered damages consisting of costs and fees associated with the loss of her automobile.

26. As a further direct and proximate result of Defendants' breach, Plaintiff has incurred the attorney fees and costs necessary to obtain the benefits and rights to which she is entitled under the policy but which Defendants refused and failed to provide.

27. As a further direct and proximate result of Defendants' breach, Plaintiff has suffered, and continues to suffer, emotional and mental distress.

28. In committing the alleged acts, Defendants acted with oppression, fraud and malice. All of the alleged acts were performed or ratified by Defendants' managerial employees, who acted with knowledge that Defendants' conduct would cause Plaintiff harm. Plaintiff is therefore entitled to recover punitive damages in an amount according to proof at trial.

V

THIRD CAUSE OF ACTION
(Unfair Claims Settlement Practices)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, Paragraphs 18 through

21 of the First Cause of Action of this Complaint, and Paragraphs 22 through 28 of the Second Cause of Action of this Complaint as though fully set forth herein.

29. Defendants are engaged in the business of insurance in the State of California, and the policy was issued and delivered by Defendants to Plaintiff in the State of California.

30. Defendants committed the acts referred to above knowingly and as part of a general business practice of:

A. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

B. Failing to adopt and implement reasonable standards for the prompt investigation of claims;

C. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

D. Failing to affirm or deny coverage of claims within a reasonable time after investigation has been completed;

E. Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which the investigation has become reasonably clear;

G. Compelling insureds to institute litigation to recover amounts due under insurance policies by refusing to pay under the policy when the investigation has become reasonably clear;

H. Delaying the investigation or payment of claims by requiring the insured to submit to a preliminary claim report and then requiring the insured to submit to further interrogation, both containing substantially the same information;

I. Allowing ALLSTATE attorneys to take the depositions of Plaintiff and her husband without providing Plaintiff and her husband with their own attorneys;

31. These acts constitute violations of the Fair Claims Settlement Practices Regulations.

32. As a result of Defendants' violations, Plaintiff was deprived of payment under the policy, lost use of her automobile, and suffered emotional distress in an amount according to proof.

///

VI

FOURTH CAUSE OF ACTION
(Injunctive Relief and Restitution)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, Paragraphs 18 through 21 of the First Cause of Action of this Complaint, Paragraphs 22 through 28 of the Second Cause of Action of this Complaint and Paragraphs 29 through 32 of the Third Cause of Action of this Complaint as though fully set forth herein.

33. Plaintiff is informed and believes that Defendants, and each of them, have engaged in and continue to engage in unlawful claims practices as alleged in paragraphs 1 through 31 above.

34. Plaintiff is informed and believes and thereon alleges that the insured of Defendants have been denied coverage and will continue to be denied coverage due to the unlawful claims practices of Defendants, and each of them.

35. Plaintiff is informed and believes and thereon alleges that no adequate remedy at law lies for Defendants' continuing violations.

VII

FIFTH CAUSE OF ACTION
(Improper Disclosure of Confidential Information)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, Paragraphs 18 through 21 of the First Cause of Action of this Complaint, Paragraphs 22 through 28 of the Second Cause of Action of this Complaint, Paragraphs 29 through 32 of the Third Cause of Action of this Complaint, and Paragraphs 33 through 35 of the Fourth Cause of Action of this Complaint as though fully set forth herein.

36. Plaintiff is informed and believes that at all times herein mentioned, Richard O. Knapp of Knapp & Spurlock, LLP was an agent, employee and attorney of Defendant ALLSTATE.

37. On or about January of 2007, Defendant ALLSTATE's agent, employee and attorney Richard O. Knapp of Knapp & Spurlock, LLP contacted Plaintiff via telephone and requested

that Plaintiff bring her confidential bank statements and other bank records to a deposition to be taken by Mr. Richard O. Knapp. Mr. Knapp misrepresented that he was going to assist Plaintiff with her property claim, lead Plaintiff to believe that she had a special and fiduciary relationship with Mr. Knapp, and improperly and wrongfully requested and acquired confidential bank records from Plaintiff. Plaintiff would not have released her confidential bank statements and other bank records to Mr. Knapp had she known that Defendant ALLSTATE's agent and employee Richard O. Knapp of Knapp & Spurlock, LLP was not her attorney, and was not representing her, or assisting her with her property claim.

38. As a result of Defendants ALLSTATE and their agents and employees, Defendants have in their possession certain confidential bank information concerning Plaintiff, to wit: bank statements and other financial records.

39. The improper and wrongful request for confidential bank records and the disclosure of the aforementioned bank records, unless enjoined and restrained by order of this court, will cause great and irreparable injury to Plaintiff in that if the information is further disclosed it will not be possible to restore its confidentiality.

40. Plaintiff has no adequate remedy at law for the injuries set forth herein because monetary damages cannot fully compensate Plaintiff for the invasion of her privacy that has been caused by the disclosure of the confidential information by Defendants, and each of them.

41. As a proximate result of Defendants' improper and wrongful disclosure of the aforementioned bank records and other conduct as mentioned above, Plaintiff has sustained damages according to proof.

42. As a further direct and proximate result of Defendants' improper and wrongful disclosure of confidential information, Plaintiff has incurred the attorney fees and costs.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

1. For damages in the sum according to proof for breach of contract;

2. For general and compensatory damages including, but limited to, injuries resulting from humiliation, mental anguish and emotional distress sum according to proof;

3. For attorneys' fees incurred in obtaining policy benefits, as provided by law;

4. For prejudgment interest in an amount to be proven at trial;

5. For Punitive and exemplary damages;

6. For a permanent injunction under the Fourth Cause of Action enjoining Defendants, their agents, successors and employees from unlawful claims practices, and under the Fifth Cause of Action enjoining Defendants, their agents, successors and employees from further disclosing and using Plaintiff's confidential bank records;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

Dated: April 11, 2008

J. Manuel Sanchez & Associates

By: ______________________
J. Manuel Sanchez, Esq.
Attorneys for Plaintiff
Oralia Martinez

J. MANUEL SANCHEZ & ASSOCIATES

482 W. San Ysidro Boulevard, Suite 3
San Ysidro, California 92173
(619) 662-2080 Fax:(619) 662-2048

April 21, 2008

CT Corporation System
RE: ALLSTATE INDEMNITY CO.
818 West Seventh St.
Los Angeles, CA 90017

RE:	My Client	:	Oralia Martinez (Plaintiff)
	Case No.	:	37-2008-00069884

Dear Sir/Madam:

This law office has been retained by the above-captioned PLAINTIFF to assist with the filing of her lawsuit against ALLSTATE INDEMNITY CO.

According to the California Secretary of State- Business Records you are the authorized agent for service of process designated by this company.

Accordingly, enclosed please find a copy of the Summons, Complaint, and Notice of Case Assignment. Also enclosed is a duly executed Proof of Service of Summons.

Please cooperate with the signing of the enclosed NOTICE AND ACKNOWLEDGMENT OF RECEIPT and return for filing with the Court in the enclosed self-addressed stamped envelope.

Thank you for your attention and anticipated prompt response to this matter.

Sincerely,

J. MANUEL SANCHEZ
Attorney at Law

Enclosures

RE: ORALIA MARTINEZ
Martinez v. Allstate

I N D E X

EXHIBIT	DESCRIPTION	PAGE NUMBER
1	ALLSTATE AUTO INSURANCE POLICY	1- 31
2	AFFIDAVIT OF VEHICLE THEFT WITH POLICE REPORT OF VEHICLE THEFT	32 - 37

EXHIBIT 1

RE: ORALIA MARTINEZ
Martinez v. Allstate

INDEX

EXHIBIT	DESCRIPTION	PAGE NUMBER
1	ALLSTATE AUTO INSURANCE POLICY	1- 31
2	AFFIDAVIT OF VEHICLE THEFT WITH POLICE REPORT OF VEHICLE THEFT	32 - 37

Allstate
You're in good hands.

Allstate Auto Insurance Policy

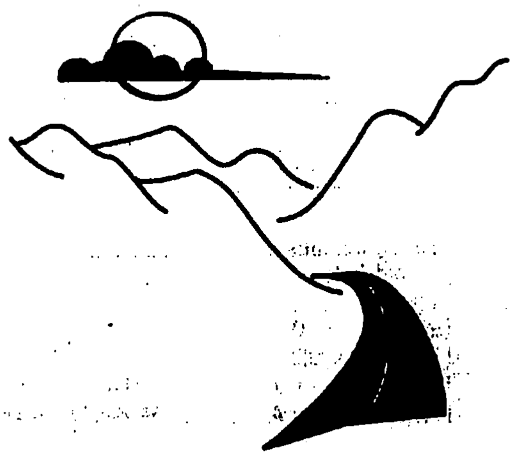
CALIFORNIA

Policy: 6 27 540781 12/07

Effective: December 7, 1999

Issued to:
Oralia Martinez
Apt 102
783 Brookstone Rd
Chula Vista CA 91913-2362

By your Allstate agent:
Candy Raya
1044 Broadway #A
Chula Vista CA 91911



AUTO *61000049912081700528230 8*

AU104-3

TABLE OF CONTENTS

General 2
When And Where The Policy Applies 2
Limited Mexico Coverage 2
Premium Changes 2
Coverage Changes 2
Duty To Report Policy Changes 2
Combining Limits Of Two Or More Autos Prohibited 3
Transfer 3
Termination 3
Non Renewal 3
Cancellation 3
Part I — Automobile Liability Insurance Coverages AA and BB 4
Insuring Agreement 4
Additional Payments Allstate Will Make 4
Insured Persons 4
Insured Autos 4
Definitions 5
Exclusions — What is not covered 5
Financial Responsibility 6
Limits Of Liability 6
If There Is Other Insurance 6
Assistance And Cooperation 6
Action Against Allstate 6
Bankruptcy or Insolvency 6
What To Do In Case Of An Auto Accident Or Claim ... 7
Part II — Automobile Medical Payments Coverage CC 7
Insuring Agreement 7
Insured Persons 7
Insured Autos 7
Definitions 7
Exclusions — What is not covered 8
Limits Of Liability 8
Unnecessary or Unreasonable Medical Expenses 9
If There Is Other Insurance 9
Assistance And Cooperation 9
Action Against Allstate 9
Proof Of Claim; Medical Reports 9
Part III — Coordinated Medical Protection Coverage CX 9
Insuring Agreement 9
Deductible 10
Insured Persons 10
Insured Autos 10
Definitions 10
Exclusions — What is not covered 11
Limits Of Liability 11
Unnecessary or Unreasonable Medical Expenses ... 11
If There Is Other Automobile Medical Insurance 12
Assistance and Cooperation ....
Action Against Allstate ....
Proof of Claim; Medical Reports ....
Part IV — Automobile Death Indemnity Insuranc[e] Coverage CM ....
Insuring Agreements ....
Insured Persons ....
Definitions ....
Exclusions — What is not covered ....
Payment Of Benefits; Autopsy ....
Consent Of Beneficiary ....
Proof Of Claim; Medical Reports ....
Part V — Automobile Disability Income Protectio[n] Coverage CW ....
Insuring Agreement ....
Insured Persons ....
Definitions ....
Exclusions — What is not covered ....
To Whom And When Payment Is Made ....
Proof Of Claim; Medical Reports ....
Part VI — Uninsured Motorists Insurance Coverage SS ....
Insuring Agreement ....
Insured Persons ....
Definitions ....
Exclusions — What is not covered ....
Limits Of Liability ....
If There Is Other Insurance ....
Proof Of Claim; Medical Reports ....
Assistance And Cooperation ....
Payment Of Loss By Allstate ....
Action Against Allstate ....
If We Cannot Agree ....
Part VII — Protection Against Loss To The Auto Coverages DD, HH, HE, HF, HG, JJ, UU, ZA, ZZ ....
Insurance Agreements For Each Coverage ....
Waiver Of Collision Deductible Option ....
If We Cannot Agree ....
Additional Payments Allstate Will Make ....
Insured Autos ....
Definitions ....
Exclusions — What is not covered ....
Right To Appraisal ....
Payment Of Loss By Allstate ....
Limits Of Liability ....
If There Is Other Insurance ....
Action Against Allstate ....
Subrogation Rights ....
What You Must Do If There Is A Loss ....

Allstate Insurance Company

The Company Named in the Policy Declarations
A Stock Company
Home Office: Northbrook, Illinois

General

This policy is a legal contract between **you** and **us**. A coverage applies only when a premium for it is shown on the Policy Declarations. If more than one **auto** is insured, premiums will be shown for each **auto**. If **you** pay the premiums when due and comply with the policy terms, **Allstate**, relying on the information **you** have given **us**, makes the following agreements with **you**.

When And Where The Policy Applies

Your policy applies only during the policy period. During this time, it applies to losses to the **auto**, accidents and occurrences within the United States of America, its territories or possessions or Canada, or between their ports.

The policy period is shown on the Policy Declarations. If **we** offer to renew **your** policy, **you** may continue the policy for a successive policy period of six months by paying the required renewal premium payment when due. If the required renewal premium payment isn't received on or before the end of the then current policy period, **your** policy will terminate automatically on the expiration date of the then current policy period.

Limited Mexico Coverage

For your protection you should purchase insurance from a company licensed in Mexico. However, the coverage of this policy for an insured private passenger or **utility auto** is extended to cover that **auto** within the Republic of Mexico. This coverage applies only while the insured **auto** is within 75 miles of the United States border and only for a period not to exceed ten days after each separate entry into the Republic of Mexico.

If loss or damage occurs which may require repair of the insured **auto** or replacement of any part(s) while the **auto** is in Mexican territory, the basis for adjustment of the claim will be as follows:

The repair or replacement costs will not exceed the cost of having the repairs or replacements made at the nearest point in the United States where the repairs or replacements can be made. The cost for towing, transportation and salvage operations of the **auto** while within Mexican territory are not covered under this policy.

WARNING

Unless **you** have auto insurance written by a Mexican insurance company, **you** may spend many hours or days in jail if **you** have an accident in Mexico. Insurance coverage should be secured from a company licensed under the laws of Mexico to write such insurance in order to avoid complications and possible penalties under the laws of Mexico, including the impoundment of **your auto**.

Changes

Premium Changes

The premium for each **auto** which **Allstate** agrees to insure based on information **Allstate** has received from **you** or other sources. **You** agree to cooperate with **us** in determining if this information is correct, if it is complete, and if it changes during the policy period. **You** agree that if this information changes or is incorrect or incomplete, **we** may adjust **your** premium accordingly during the policy period.

Coverage Changes

When **Allstate** broadens a coverage during the policy period without additional charge, **you** have the new feature if **you** have the coverage to which it applies. The new feature applies on the date the coverage change is effective in **your** state. Otherwise, the policy can be changed only by endorsement. Any change in **your** coverage will be made using the rules, rates and forms in effect, and on file if required, for **our** use in **your** state.

Duty To Report Policy Changes

Your policy was issued in reliance on the information **you** provided concerning **autos** and persons insured by the policy. To properly insure **your auto**, **you** should promptly notify **us** when **you** change **your** address or whenever any **resident** operators insured by **your** policy are added or deleted.

You must tell **us** within 30 days when **you** acquire a replacement **auto**. If **you** don't, certain coverages of this policy may not apply.

AUTO *6100004991208170052823309*

3

Allstate Insurance Company

When **you** acquire an additional **auto**, **we** will provide 30 days of coverage immediately after **you** become the owner. However, **we** will provide this coverage only if:

1. **you** acquire the **auto** during the policy period;
2. **you** tell **us** within 30 days of acquiring the **auto**;
3. no other insurance policy provides coverage for the **auto**; and
4. **you** pay the additional premium.

We will not provide coverage for more than 30 days unless:

1. **you** ask **us** to insure the additional **auto** within 30 days after **you** become the owner;
2. **we** agree to provide the coverage **you** select for this **auto**; and
3. **you** pay the additional premium.

Combining Limits Of Two Or More Autos Prohibited

If **you** have two or more **autos** insured in **your** name and one of these **autos** is involved in an accident, only the coverage limits shown on the Policy Declarations for that **auto** will apply. When **you** have two or more **autos** insured in **your** name and none of them is involved in the accident, **you** may choose any single **auto** shown on the Policy Declarations and the coverage limits applicable to that **auto** will apply.

The limits available for any other **auto** covered by the policy will not be added to the coverage for the involved or chosen **auto**.

Transfer

This policy can't be transferred to anyone without our written consent. However, if **you** die, coverage will be provided until the end of the policy period for:

1. **your** legal representative while acting as such, and
2. persons covered on the date of **your** death.

Termination

If **we** offer to renew **your** policy and **your** required premium payment isn't received on or before the end of the then current policy period, **your** policy will terminate automatically on the expiration date of the then current policy period.

Non Renewal

If **we** don't intend to continue the policy beyond the current policy period, **we** will mail **you** notice at least 20 days before the end of the policy period.

Cancellation

You may cancel this policy by writing **us** the future date **you** wish to stop coverage.

Allstate may cancel part or all of this policy by mailing notice to **you** at **your** last known address. If **we** cancel because **you** didn't pay the premium, the date of cancellation will be at least 10 days after the date of mailing. If **we** cancel for any reason other than non-payment of premium, **we** will give **you** notice as follows:

1. During the first 60 days the original policy is in effect, **we** will give **you** 10 days notice of cancellation.
2. After the first 60 days, **we** will give **you** 20 days notice of cancellation.

Proof of mailing the notice will be proof of notice. A refund, if due, will be in proportion to the time **your** policy has been in effect. Cancellation will be effective even if the refund is not made immediately.

After **your** original policy has been in effect 60 days, **Allstate** won't cancel or reduce **your** coverage during the policy period unless:

1. **you** don't pay the premium when it's due;
2. **you** or any member of **your** household has had a driver's license suspended or revoked during the last 12 months; or
3. **Allstate** has mailed notice within the first 60 days that **we** don't intend to continue the policy.

Part I
Automobile Liability Insurance
Bodily Injury—Coverage AA
Property Damage — Coverage BB

Allstate will pay those damages which an insured person is legally obligated to pay because of:

1. **bodily injury**, sustained by any person, and
2. damage to, or destruction of, property.

Under these coverages, your policy protects an insured person from liability for damage arising out of the ownership, maintenance or use, loading or unloading of an insured **auto**.

We will defend an insured person sued for damages which are covered by this policy even if the suit is groundless or false. We will choose the counsel. We may settle any claim or suit if we believe it is proper. We will not defend an insured person sued for damages which are not covered by this policy.

Additional Payments Allstate Will Make

When we defend an insured person under this Part, we will pay:

1. up to $50 a day for loss of wages or salary if we ask that person to attend hearings or trials to defend against a **bodily injury** suit. We won't pay for loss of other income. We will pay other reasonable expenses incurred at our request.
2. court costs for defense.
3. interest accruing on damages awarded. We will pay this interest only until we have paid, offered, or deposited in court the amount for which we are liable under this policy. We will only pay interest on damages not exceeding our limits of liability.
4. premiums on appeal bonds and on bonds to release attachments, but not in excess of our limit of liability. We aren't required to apply for or furnish these bonds.

We will repay an insured person for:

1. the cost of any bail bonds required due to an accident or traffic law violation involving the use of the insured **auto**. We won't pay more than $300 per bond. We aren't required to apply for or furnish these bonds.
2. any expense incurred for first aid to others at the time of an **auto** accident involving the insured **auto**.

Insured Persons

1. While using your insured **auto**:
   a) you,
   b) any **resident**, and
   c) any other person using it with your permission.
2. While using a non-owned **auto**:
   a) you,
   b) any **resident** relative using a four wheel private passenger **auto** or **utility auto**.
3. Any other person or organization liable for the use of an insured **auto** if the **auto** is not owned or hired by this person or organization, provided the use is by an insured person under 1. or 2. above and then only for that person's acts or omissions.

Insured Autos

1. Any **auto** described on the Policy Declarations. This includes the four wheel private passenger **auto** or **utility auto** you replace it with.
2. An additional four wheel private passenger **auto** or **utility auto** you become the owner of during the policy period will be covered for 30 days immediately after you acquire it. However, we will provide this coverage only if **Allstate** or one of its affiliates insures all other private passenger **autos** or **utility autos** you own, and you pay the additional premium.

   Coverage will be continued beyond this 30 day period only if:
   a) you ask us to continue coverage within 30 days after you acquire the **auto** or **utility auto**;
   b) we agree to continue coverage for this additional **auto** or **utility auto**;
   c) you pay the additional premium.
3. A substitute four wheel private passenger **auto** or **utility auto**, not owned by you or a **resident**, being temporarily used while your

AUTO *61000049912061700052823 10*

Allstate Insurance Company

insured **auto** is being serviced or repaired, or if **your** insured auto is stolen or destroyed.

4. A non-owned **auto** used by **you** or a **resident** relative with the owner's permission. This **auto** must not be available or furnished for the regular use of **you** or a **resident** relative.

5. A trailer while attached to an insured **auto**. The trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**.

Definitions

1. **"Allstate", "We", "Us"**, or **"Our"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness, disease or death.

4. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

5. **"Utility Auto"**—means an **auto** of the pick-up body, sedan delivery or panel truck type. This **auto** must have a rated load capacity of not more than 2,000 pounds.

6. **"You"** or **"Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

Exclusions—What Is not covered

Allstate will not pay for those damages which an insured person is legally obligated to pay because of:

1. **bodily injury** or property damage arising out of the use of **your** insured **auto** while used to carry persons or property for a charge, or any **auto you** are driving while available for hire by the public. This exclusion does not apply to shared-expense car pools or when the three following conditions are met:
   a) **you** are operating an **auto** as a volunteer service for a nonprofit charitable organization or a governmental agency; and
   b) **you** are transporting physically or mentally handicapped persons or persons 60 years of age or older; and
   c) **you** do not receive more than the amount allowed for by law for reimbursement of actual miles driven.

2. **bodily injury** or property damage arising out of auto business operations such as repairing, servicing, testing, washing, parking, storing, or selling **autos**. This exclusion applies only if there is other collectible liability insurance available to that person with limits at least equal to the minimum requirements of the applicable Motor Vehicle Financial Responsibility law. However, if there is no other collectible liability insurance, the maximum payable under this policy is limited to the minimum requirements of the applicable Motor Vehicle Financial Responsibility law.

   However, coverage does apply to **you**, or a **resident** relative when using **your** insured **auto**.

3. **bodily injury** or property damage arising out of the use of a non-owned **auto** in any business or occupation of an insured person. However, this exclusion does not apply while **you**, **your** chauffeur, or domestic servant are using a private passenger **auto** or trailer.

4. **bodily injury** to an employee of any insured person arising in the course of employment. This exclusion does not apply to **your** domestic employee who is not required to be covered by a worker's compensation law or similar law.

5. **bodily injury** to a co-worker injured in the course of employment. This exclusion does not apply to **you**.

6. **bodily injury** to **you** or any **resident** of **your** household related to **you** by blood, marriage, or adoption whenever the ultimate benefits of this coverage would accrue directly or indirectly to **you** or any **resident** of **your** household related to **you** by blood, marriage or adoption.

7. damage to or destruction of property an insured person owns, transports, is in charge of, or rents. An **auto** operated by an insured person is considered to be property in charge of an insured person. However, a private residence or a garage rented by that person is covered.

8. **bodily injury** or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person.

9. **bodily injury** or property damage which would also be covered under nuclear energy liability insurance. This applies even if the limits of that insurance are exhausted.

Financial Responsibility

When this policy is certified as proof under any motor vehicle financial responsibility law, this policy will comply with the provisions of that law.

Limits Of Liability

The limits shown on the Policy Declarations are the maximum **we** will pay for any single **auto** accident. The limit stated for each person for **bodily injury** is the maximum **we** will pay for damages because of **bodily injury** sustained by one person in any single **auto** accident, including damages sustained by anyone else as a result of the **bodily injury**. Subject to the limit for each person, the limit stated for each occurrence is the maximum **we** will pay for damages for **bodily injury** sustained by two or more persons in any single **auto** accident. For property damage, the limit applies to damages arising from each occurrence.

The liability limits apply to each insured **auto** as shown on the Policy Declarations. The insuring of more than one person or **auto** under this policy will not increase **our** liability limits beyond the amount shown for any one **auto**, even though a separate premium is charged for each **auto**. The limits also won't be increased if **you** have other auto insurance policies that apply.

There will be no duplication of payments made under the Bodily Injury Liability and Uninsured Motorists Coverage of this policy.

An **auto** and attached trailer are considered one **auto**. Also, an **auto** and a mounted camper unit, topper, cap or canopy are considered one **auto**.

If a single "each occurrence" limit is stated on the Policy Declarations for Automobile Liability Insurance, this limit will be the maximum amount of **Allstate's** liability for both **bodily injury** and property damage arising out of any one occurrence.

If There Is Other Insurance

If an insured person is using a substitute private passenger **auto** or non-owned **auto**, **our** liability insurance will be excess over other collectible insurance. If more than one policy applies on a primary basis to an accident involving **your** insured **auto**, **we** will bear **our** proportionate share with other collectible liability insurance.

If more than one policy applies on an excess basis, **we** will bear **our** proportionate share with other collectible excess liability insurance.

Assistance And Cooperation

When **we** ask, an insured person must cooperate with **us** in the investigation, settlement and defense of any claim or lawsuit. If **we** ask, that person must also help **us** obtain payment from anyone who may be jointly responsible.

We can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for bail bonds or first aid to others.

Action Against Allstate

No insured person may sue **us** under this coverage unless there is full compliance with all the policy terms.

If liability has been determined by judgment after trial, or by written agreement among the insured, the other person, and **us**, then whoever obtains this judgment or agreement against an insured person, may sue **us** up to the limits of this policy. However, no one has the right to join **us** in a suit to determine legal responsibility.

Bankruptcy or Insolvency

The bankruptcy or insolvency of an insured person or that person's estate won't relieve **us** of any obligation.

AUTO *61000049912081700528231 1*

7

Allstate Insurance Company

What To Do In Case Of An Auto Accident Or Claim

If an insured person has an **auto** accident, **we** must be informed promptly of all details. If an insured person is sued as the result of an **auto** accident, **we** must be informed as soon as possible.

Part II
Automobile Medical Payments Coverage CC

Allstate will pay to or on behalf of an insured person all reasonable expenses actually incurred by an insured person for necessary medical treatment, medical services or medical products actually provided to the insured person. Ambulance, hospital, medical, surgical, X-ray, dental, orthopedic and prosthetic devices, pharmaceuticals, eyeglasses, hearing aids, and funeral service expenses, and professional nursing services are covered. Payments will be made only when **bodily injury** is caused by an **auto** accident.

The treatment, services, or products must be rendered within one year after the accident. This will be extended to five years if the amount of insurance shown on the Policy Declarations for this coverage is more than $5,000.

This coverage does not apply to any person to the extent that the treatment is covered under any workers compensation law.

Insured Persons

1. **You** and any **resident** relative who sustains **bodily injury** while in, on, getting into or out of, or when struck by an **auto** or trailer. The use of a non-owned **auto** must be with the owner's permission.

2. Any other person who sustains **bodily injury** while in, on, getting into or out of
   a) **your** insured **auto** while being used by **you**, a **resident** relative, or any other person with **your** permission.
   b) a non-owned **auto** if the injury results from **your** operation or occupancy.
   c) a non-owned **auto** if the injury results from the operation on **your** behalf by **your** private chauffeur or domestic servant.
   d) a non-owned private passenger **auto** or trailer if the injury results from the operation or occupancy by a **resident** relative.

   The use of non-owned **autos** must be with the owner's permission.

Insured Autos

1. Any **auto** described on the Policy Declarations. This includes the four wheel private passenger **auto** or **utility auto you** replace it with.

2. An additional four wheel private passenger **auto** or **utility auto you** acquire ownership of during the policy period will be covered for 30 days immediately after **you** become the owner. However, **we** will provide this coverage only if **Allstate** or one of its affiliates insure all other private passenger **auto** or **utility autos you** own, and **you** pay the additional premium.

   Coverage will be continued beyond this 30 day period only if:
   a) **you** ask **us** to continue coverage within 30 days after **you** acquire the **auto** or **utility auto**;
   b) **we** agree to continue coverage for this additional **auto** or **utility auto**;
   c) **you** pay the additional premium.

3. A substitute four wheel private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, temporarily used while **your** insured **auto** is being serviced or repaired, or if **your** insured **auto** is stolen or destroyed.

4. A non-owned **auto** having not less than four wheels used with the owner's permission. This **auto** must not be available or furnished for the regular use of an insured person.

5. A trailer while attached to an insured **auto**. The trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**.

Definitions

1. **"Allstate"**, **"We"**, **"Us"**, or **"Our"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness, disease or death.

4. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

5. **"Utility Auto"**—means an **auto** of the pickup body, sedan delivery or panel truck type. This **auto** must have a rated load capacity of not more than 2,000 pounds.

6. **"You"** or **"Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

Exclusions—What Is not covered

This coverage does not apply to **bodily injury** to:

1. **you** or a **resident** relative while in, on, getting into or out of an **auto you** or a **resident** relative own but do not insure for this coverage.

2. **you** or a **resident** relative while in, on, getting into or out of, or struck as a pedestrian by:
   a) a vehicle operated on rails or crawler-treads, or
   b) a vehicle or other equipment designed for use off public roads, while not on public roads.

3. any person while in, on, getting into or out of:
   a) an owned **auto** while available for hire to the public. This exclusion does not apply to shared-expense car pools.
   b) an **auto** or trailer while used as a residence or premises.

4. any person, other than **you** or a **resident** relative, while using a non-owned **auto**:
   a) which is available for hire by the public, or
   b) in **auto** business operations such as repairing, servicing, testing, washing, parking, storing or selling of **autos**.

   Coverage is provided for **you**, **your** private chauffeur or domestic servant while using a private passenger **auto** or trailer in any other business or occupation.

5. any person resulting from any act of war, insurrection, rebellion, or revolution.

Limits Of Liability

The limit shown on the Policy Declarations is the maximum **we** will pay for all expenses incurred by or for each person as the result of any one **auto** accident.

The medical payments limit applies to each insured **auto** as shown on the Policy Declarations. The insuring of more than one person or **auto** under this policy won't increase **our** limit beyond the amount shown for any one **auto**, even though a separate premium is charged for each **auto**. The limit also won't be increased if **you** have other auto insurance policies that apply.

If an insured person dies as the result of a covered **auto** accident, **we** will pay the least of the following as a funeral service expenses benefit:

1. $2,000; or

2. the Coverage CC limit of liability stated on the Policy Declarations; or

3. the remaining portion of the Coverage CC limit of liability not expended for other covered medical expenses.

This funeral service expenses benefit does not increase, and will not be paid in addition to, the limits of liability stated on the Policy Declarations for Coverage CC. This benefit is payable to the deceased insured person's spouse if a resident of the same household at the time of the accident. However, if the deceased is a minor, the benefit is payable to either parent if that parent is a resident of the same household at the time of the accident. In all other cases, the benefit is payable to the deceased insured person's estate.

There will be no duplication of payments made under the Bodily Injury Liability and Automobile Medical Payments coverages of this policy. All payments made to or on behalf of any person under this coverage will be considered as advance payments to that person. The damages payable under the Bodily Injury Liability coverage of this policy will be reduced by that amount.

AUTO *610000499120817005282312*

9

Allstate Insurance Company

Unnecessary or Unreasonable Medical Expenses

If the insured person incurs medical expenses which we deem to be unreasonable or unnecessary, we may refuse to pay those expenses and contest them. Unreasonable medical expenses are fees for medical services which are substantially higher than the usual and customary charges for those services. Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for treatment of the injury, including fees for an excessive number, amount, or duration of medical services.

If the insured person is sued by a medical services provider because we refuse to pay contested medical expenses, we will pay all defense costs and any resulting judgment against the insured person. We will choose the counsel. The insured person must cooperate with us in the defense of any claim or lawsuit. If we ask the insured person to attend hearings or trials, we will pay up to $50 per day for lost wages or salary. We will also pay other reasonable expenses incurred at our request.

If There Is Other Insurance

When this coverage applies to a substitute **auto** or non-owned **auto**, **Allstate** will pay only after all other collectible auto medical insurance has been exhausted.

When this coverage applies to a replacement **auto** or additional **auto**, this policy will not apply if **you** have other collectible auto medical insurance.

When this coverage applies to an owned **auto** insured by an affiliate of **Allstate** or any other insurer, **Allstate** will pay only after all other collectible **auto** medical insurance has been exhausted.

Assistance And Cooperation

When **we** ask, an insured person must cooperate with **us** in the investigation, settlement and defense of any claim or lawsuit. If **we** ask, that person must also help **us** obtain payment from anyone who may be jointly responsible.

We can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for first aid to others.

Action Against Allstate

No one may sue **us** under this coverage unless there is full compliance with all the policy terms.

Proof Of Claim; Medical Reports

As soon as possible, any person making claim must give **us** written proof of claim. It must include all details **we** may need to determine the amounts payable. **We** may also require any person making claim to submit to questioning under oath and sign the transcript.

The injured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonably require. **We** must be given authorization to obtain medical reports and other records pertinent to the claim.

Part III
Coordinated Medical Protection
Coverage CX

Allstate will pay to or on behalf of an insured person all reasonable expenses incurred for necessary medical treatment, services, or products actually provided to an insured person. Ambulance, hospital, medical, surgical, X-ray, dental, orthopedic and prosthetic devices, pharmaceuticals, eyeglasses, hearing aids, funeral service expenses, and professional nursing services are covered. Payments will be made only when **bodily injury** is caused by an **auto** accident. The treatment, services, or products must be rendered within five years after the accident.

Coverage CX applies to **you** and **resident** relatives on an excess basis only. This means that **Allstate** will not be liable to the extent that any elements of loss covered under Coordinated Medical Protection are paid, payable or required to be provided to or on behalf of **you** or a **resident** relative under the provisions of any and all **primary medical plans**.

Coverage CX will apply on a primary basis to expenses for elements of loss which are not covered under the **primary medical plan** applicable to **you** or **resident** relatives.

Coverage CX does not apply to any person to the extent that the treatment is covered under any workers compensation law.

Pa|

10

Allstate Insurance Company

Allstate
You're in good hands.

Deductible

If there is no **primary medical plan** covering **you** and **resident** relatives in effect on the date of the accident, **Allstate** will pay only when covered expenses for **you** or a **resident** relative exceed $2,000. **We** will then pay only the excess amount. This deductible applies to each person. This paragraph does not apply if coverage under the **primary medical plan** terminates within 30 days prior to the loss.

This deductible does not apply to funeral service expenses.

Insured Persons

1. **You** and any **resident** relative who sustains **bodily injury** while in, on, getting into or out of, or when struck by, an **auto** or trailer. The use of a non-owned **auto** must be with the owner's permission.

2. Any other person who sustains **bodily injury** while in, on, getting into or out of
   a) **your** insured **auto** while being used by **you**, a **resident** relative, or any other person with **your** permission.
   b) a non-owned **auto** if the injury results from **your** operation or occupancy.
   c) a non-owned **auto** if the injury results from the operation on **your** behalf by **your** private chauffeur or domestic servant.
   d) a non-owned private passenger **auto** or trailer if the injury results from the operation or occupancy by a **resident** relative.

   The use of non-owned **autos** must be with the owner's permission.

Insured Autos

1. Any **auto** described on the Policy Declarations. This includes the four wheel private passenger **auto** or **utility auto you** replace it with.

2. An additional four wheel private passenger **auto** or **utility auto you** acquire ownership of during the policy period will be covered for 30 days immediately after **you** become the owner. However, **we** will provide this coverage only if **Allstate** or one of its affiliates insure all other private passenger **autos** or **utility autos you** own, and **you** pay the additional premium.

   Coverage will be continued beyond this 30 day period only if:
   a) **you** ask **us** to continue coverage within 30 days after **you** acquire the **auto** or **utility auto**;
   b) **we** agree to continue coverage for this additional **auto** or **utility auto**;
   c) **you** pay the additional premium.

3. A substitute four wheel private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, temporarily used while **your** insured **auto** is being serviced or repaired, or if **your** insured **auto** is stolen or destroyed.

4. A non-owned **auto** having not less than four wheels used with the owner's permission. This **auto** must not be available for the regular use of an insured person.

5. A trailer while attached to an insured **auto**. The trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**.

Definitions

1. **"Allstate"**, **"We"**, **"Us"**, or **"Our"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness, disease or death.

4. **"Primary Medical Plan"**—means individual, blanket or group accident disability, health, major medical or hospitalization insurance or a health maintenance organization which covers expenses on a primary basis for treatment, services and products required due to a **bodily injury** caused by an **auto** accident. The Federal Medicare program is not a primary medical plan.

5. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

AUTO *610000499120817005282313*

Allstate Insurance Company

6. **"Utility Auto"**—means an **auto** of the pickup body, sedan delivery or panel truck type. This **auto** must have a rated load capacity of not more than 2,000 pounds.

7. **"You"** or **"Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

Exclusions—What Is not covered

This coverage does not apply to **bodily injury** to

1. **you** or a **resident** relative while in, on, getting into or out of an **auto you** or a **resident** relative own but do not insure for this coverage under this policy.

2. **you** or a **resident** relative while in, on, getting into or out of, or when struck as a pedestrian by:
   a) a vehicle operated on rails or crawler-treads, or
   b) a vehicle or other equipment designed for use off public roads while not on public roads.

3. any person while in, on, getting into or out of:
   a) an owned **auto** while available for hire to the public. This exclusion does not apply to shared-expense car pools.
   b) an **auto** or trailer while used as a residence or premises.

4. any person, other than **you** or a **resident** relative, while using a non-owned **auto**:
   a) which is available for hire by the public, or
   b) in auto business operations such as repairing, servicing, testing, washing, parking, storing or selling of **autos**.

   Coverage is provided for **you**, **your** private chauffeur or domestic servant while using a private passenger **auto** or trailer in any other business or occupation.

5. any person resulting from any act of war, insurrection, rebellion, or revolution.

Limits Of Liability

The limit shown on the Policy Declarations is the maximum **we** will pay for all expenses incurred by or for each insured person as the result of any one **auto** accident.

The medical payments limit applies to each insured **auto** as shown on the Policy Declarations. The insuring of more than one person or **auto** under this policy won't increase **our** limit beyond the amount shown for any one **auto**, even though a separate premium is charged for each **auto**. The limit also won't be increased if **you** have other auto insurance policies that apply.

If an insured person dies as the result of a covered **auto** accident, **we** will pay the least of the following as a funeral service expenses benefit:

1. $2,000; or

2. the remaining portion of the Coverage CX limit of liability not expended for other covered medical expenses.

This funeral service expenses benefit does not increase, and will not be paid in addition to, the limits of liability stated on the Policy Declarations for Coverage CX. This benefit is payable to the deceased insured person's spouse if a resident of the same household at the time of the accident. However, if the deceased is a minor, the benefit is payable to either parent if that parent is a resident of the same household at the time of the accident. In all other cases, the benefit is payable to the deceased insured person's estate.

There will be no duplication of payments made under the Bodily Injury Liability and Coordinated Medical Protection coverage of this policy. All payments made to or on behalf of any person under this coverage will be considered as advance payments to that person. The damages payable under the Bodily Injury Liability coverage of this policy will be reduced by that amount.

Unnecessary or Unreasonable Medical Expenses

If the insured person incurs medical expenses which **we** deem to be unreasonable or unnecessary, **we** may refuse to pay those expenses and contest them. Unreasonable medical expenses are fees for medical services which are substantially higher than the usual and customary charges for those services. Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for treatment of the injury, including fees for an excessive number, amount, or duration of medical services.

Allstate Insurance Company

Allstate
You're in good hands.

If the insured person is sued by a medical services provider because **we** refuse to pay contested medical expenses, **we** will pay all defense costs and any resulting judgment against the insured person. **We** will choose the counsel. The insured person must cooperate with **us** in the defense of any claim or lawsuit. If **we** ask the insured person to attend hearings or trials, **we** will pay up to $50 per day for lost wages or salary. **We** will also pay other reasonable expenses incurred at our request.

If There Is Other Automobile Medical Insurance

When this coverage applies to a substitute **auto** or a non-owned **auto**, **Allstate** will pay only after all other collectible auto medical insurance has been exhausted.

When this coverage applies to a replacement **auto** or additional **auto**, this policy will not apply if **you** have other collectible auto medical insurance.

When this coverage applies to an owned auto insured by an affiliate of **Allstate** or any other insurer, **Allstate** will pay only after all other collectible auto medical insurance has been exhausted.

Assistance and Cooperation

When **we** ask, an insured person must cooperate with **us** in the investigation, settlement and defense of any claim or lawsuit. If **we** ask, that person must also help us obtain payment from anyone who may be jointly responsible.

We can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for first aid to others.

Action Against Allstate

No one may sue **us** under this coverage unless there is full compliance with all the policy terms.

Proof of Claim; Medical Reports

As soon as possible, any person making claim must give **us** written proof of claim. It must include all details **we** may need to determine the amounts payable. **We** may also require any person making claim to submit to questioning under oath and sign the transcript.

The injured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonably require. **We** must be given authorization to obtain medical reports and other records pertinent to the claim.

Part IV
Automobile Death Indemnity Insurance
Coverage CM

Allstate will pay the benefit shown on the Policy Declarations if an insured person dies as the direct result of **bodily injury** caused by an auto accident. The injury must be sustained while the insured person is in, on, getting into or out of, or when struck as a pedestrian by an **auto**, trailer or semi-trailer.

Benefits will be paid only if:

1. death occurs within 90 days of the **auto** accident; or

2. death occurs within 1 year of the **auto** accident and the **bodily injury** has continuously prevented the insured person from performing all duties pertaining to that person's occupation.

Insured Persons

The person or persons shown as insured on the Policy Declarations under Coverage CM.

Definitions

1. **"Allstate", "We", or "Us"**—means the company as indicated on the Policy Declarations.

2. **"Auto"** — means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness or disease.

Exclusions—What is not covered

This coverage does not apply to death:

1. sustained in the course of an occupation by any person while:
   a) operating, loading, unloading, assisting on, or performing any other duties related to the use of a commercial **auto**, or an **auto** hired or rented to others for a charge.

AUTO *61000049912081700528231 4*

13

b) repairing or servicing **autos**, including any related duties.

2. due to suicide committed while sane or insane.

3. due to any act of war, insurrection, rebellion, or revolution.

4. sustained while in, on, getting into or out of, or when struck as a pedestrian by
   a) a vehicle operated on rails or crawler-treads;
   b) a vehicle or other equipment designed for use off public roads, while not on public roads; or
   c) a vehicle when used as a residence or premises.

Payment Of Benefits; Autopsy

The benefit is payable to the deceased insured person's spouse. The spouse must be a resident of the same household as the insured person at the time of the accident. However, if the deceased is a minor, the benefit is payable to either parent. That parent must be a resident of the same household as the minor at the time of the accident. In all other cases, the benefit is payable to the deceased insured person's estate.

Allstate has the right and must be given the opportunity to make an autopsy where it is not prohibited by law.

Consent Of Beneficiary

The beneficiary's consent is not required for cancellation, assignment, change of beneficiary, or any other change under this coverage.

Proof Of Claim; Medical Reports

As soon as possible, **we** must be given written proof of claim. It must include all details **we** may need to determine if benefits are payable.

We must be given authorization to obtain medical reports and copies of records.

Part V
Automobile Disability Income Protection
Coverage CW

Allstate will pay the weekly benefit shown on the Policy Declarations if an insured person sustains continuous total disability as a direct result of **bodily injury** caused by an **auto** accident. The injury must be sustained while in, on, getting into or out of, or when struck as a pedestrian by an **auto**, trailer or semi-trailer.

Benefits will be paid only while the insured person is alive and only if the disability:

1. commences within 20 days of the date of the accident; and

2. during the first year after commencement, continuously prevents the insured person from performing all duties pertaining to that person's occupation; and

3. during the second and subsequent years after commencement, continuously prevents the insured person from engaging in any occupation or employment for wage or profit.

Insured Persons

The person or persons shown as insured on the Policy Declarations under Coverage CW.

Definitions

1. **"Allstate"**, **"We"**, or **"Us"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness or disease.

Exclusions—What Is not covered

This coverage does not apply to disability:

1. sustained in the course of an occupation by any person while:
   a) operating, loading, unloading, assisting on, or performing any other duties related to the use of a commercial **auto**, or an **auto** hired or rented to others for a charge.

b) repairing or servicing **autos**, including any related duties.

2. due to any attempt at suicide while sane or insane.

3. due to any act of war, insurrection, rebellion or revolution.

4. sustained while in, on, getting into or out of, or when struck as a pedestrian by
   a) a vehicle operated on rails or crawler-treads;
   b) a vehicle or other equipment designed for use off public roads, while not on public roads; or
   c) a vehicle when used as a residence or premises.

To Whom And When Payment Is Made

Weekly benefits are payable to the disabled insured person. Accrued weekly benefits are payable every four weeks. Any remaining balance is payable at termination of the disability period. Benefits end upon the death of the insured person.

Proof Of Claim; Medical Reports

As soon as possible, any person making claim must give **us** written proof of claim.

The injured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonably require. **We** must be given authorization to obtain medical reports and copies of records.

Part VI
Uninsured Motorists Insurance Coverage SS

We will pay those damages that an insured person is legally entitled to recover from the owner or operator of an uninsured auto because of:

1. **bodily injury** sustained by an insured person, and **property damage**.

2. **Property damage** is covered only if a separate limit is shown on the Policy Declarations for Uninsured Motorists Insurance—Property Damage.

The **bodily injury** or **property damage** must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto. **We** will not pay any punitive or exemplary damages.

The right to benefits and the amount payable will be decided by agreement between the insured person and **Allstate**. If an agreement can't be reached, the decision will be made by arbitration.

If an insured person sues a person believed responsible for the accident without **our** written consent, **we** aren't bound by any resulting judgment.

Insured Persons

1. **You** and any **resident** relative.

2. Any other person while in, on, getting into or out of an insured auto with **your** permission.

3. Any other person who is legally entitled to recover because of **bodily injury** to **you**, a **resident** relative, or an occupant of **your** insured auto with **your** permission.

An insured auto is a motor vehicle:

1. described on the Policy Declarations. This includes the **motor vehicle you** replace it with.

2. **you** become the owner of during the premium period. This additional **motor vehicle** will be covered for 30 days immediately after **you** become the owner. However, **we** will provide this coverage only if **Allstate** or one of its affiliates insure all other private passenger **motor vehicles you** own, and **you** pay the additional premium. Coverage will be continued beyond this 30 day period only if:
   a) **you** ask **us** to continue coverage within 30 days after **you** acquire the **motor vehicle**;
   b) **we** agree to continue coverage for this additional **motor vehicle**;
   c) **you** pay the additional premium.

3. not owned by **you** or a **resident** relative if being temporarily used while **your** insured auto is being serviced or repaired, or if **your** insured auto is stolen or destroyed. The **motor vehicle** must be used with the owner's permission.

Allstate Insurance Company

4. not owned by **you** or a **resident** relative, if being operated by **you** with the owner's permission. The **motor vehicle** can't be furnished for the regular use of **you** or any **resident** relative.

An insured auto is not a **motor vehicle** made available for public hire by an insured person. This restriction does not apply when the three following conditions are met:

1. **you** are operating an auto as a volunteer service for a non-profit charitable organization or governmental agency; and
2. **you** are transporting physically or mentally handicapped persons or persons 60 years of age or older; and
3. **you** do not receive more than the amount allowed for by state law for reimbursement of actual mileage driven.

An uninsured auto is:

1. a **motor vehicle** which has no bodily injury or property damage liability bond or insurance policy in effect at the time of the accident.
2. a **motor vehicle** for which the insurer denies coverage, becomes insolvent or refuses to admit coverage except conditionally or with reservation.
3. a hit-and-run **motor vehicle** which causes:
   a) **bodily injury** to an insured person by physical contact with the insured person or with a vehicle occupied by that person. The identity of the operator and the owner of the vehicle must be unknown. The accident must be reported within 24 hours to the proper authorities. **We** must be notified within 30 days.
   b) **property damage** by direct physical contact with the insured auto. The identity of the operator or the owner of the vehicle must be known or the vehicle itself must be identified by its license number. **We** must be notified within 10 business days. This coverage does not apply if the identified vehicle has applicable property damage insurance.

   If the insured person was occupying a vehicle at the time of the accident, **we** have a right to inspect it.
4. an underinsured **motor vehicle** which has a bodily injury liability bond or bodily injury liability insurance in effect and applicable at the time of the accident, but in an amount less than the applicable bodily injury limit of liability for Uninsured Motorists Bodily Injury coverage shown on the Policy Declarations.

An uninsured auto is not:

1. a **motor vehicle** that is lawfully self-insured.
2. a **motor vehicle** owned by any federal, state, or local government or agency.
3. a **motor vehicle** insured for bodily injury under Part I of this policy.

Definitions

1. **"Allstate", "We", "Us", or "Our"**—means the company as indicated on the Policy Declarations.
2. **"Bodily Injury"**—means bodily injury, sickness, disease or death.
3. **"Motor Vehicle"**—means a land motor vehicle or trailer other than
   a) a vehicle or other equipment designed or modified for use off public roads, while not on public roads, or
   b) a vehicle when used as a residence or premises.
4. **"Property Damage"**—means damage to or destruction of the insured auto, but does not include loss of use of the insured auto, damage to personal property contained in the insured auto or damage caused by an underinsured **motor vehicle**.
5. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.
6. **"You" or "Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

Allstate Insurance Company

Allstate
You're in good hands.

Exclusions—What Is not covered

Allstate will not pay any damages an insured person is legally entitled to recover because of:

1. **bodily injury** or **property damage** to any person who makes a settlement without **our** written consent.

2. **bodily injury** or **property damage** sustained while in, on, getting into or out of or when struck by an uninsured **motor vehicle** which is owned by **you** or a **resident** relative.

3. **bodily injury** or **property damage** sustained while in, on, getting into or out of a vehicle **you** own which is owned by **you** or a **resident** relative which is insured for this coverage under another policy.

4. **bodily injury** or **property damage**, if the payment would directly or indirectly benefit any workers compensation or disability benefits insurer, including a self-insurer, or directly benefit the United States, or any state or political subdivision.

Limits Of Liability

1. The coverage limit shown on the Policy Declarations for:
   a) "each person" is the maximum that **we** will pay for damages arising out of **bodily injury** to one person in any one **motor vehicle** accident, including all damages sustained by anyone else as a result of that **bodily injury**.
   b) "each accident" is the maximum that **we** will pay for damages arising out of **bodily injury** to two or more persons in any one **motor vehicle** accident. This limit is subject to the limit for "each person".
   c) "each accident" is the maximum that **we** will pay for **property damage** arising out of any one **motor vehicle** accident. Subject to this limit, **our** limit of liability for **property damage** will be the lessor of:
      1) the actual cash value of the insured auto; or
      2) the amount necessary to repair or replace the insured auto.

2. These limits are the maximum **Allstate** will pay for any one **motor vehicle** accident regardless of the number of:
   a) claims made;
   b) vehicles or persons shown on the Policy Declarations; or
   c) vehicles involved in the accident.

   The Uninsured Motorists Coverage limits apply to each insured **motor vehicle** as shown on the Policy Declarations.

3. The limits for Coverage SS will be reduced by all amounts paid by or on behalf of the owner or operator of the underinsured **motor vehicle**.

4. **We** are not obligated to make any payment for **bodily injury** under this coverage which arises out of the use of an underinsured **motor vehicle** until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been exhausted by payment of judgments or settlements.

5. Any loss payable under Coverage SS will be reduced by:
   a) all amounts payable under the bodily injury liability coverage provided by this policy.
   b) all amounts payable under any workers compensation law.

6. Subject to the limits of liability, damages payable will be reduced by any amount paid or due under this or any other automobile policy for:
   a) medical payments coverage; or
   b) coordinated medical payments coverage; or
   c) any similar medical payments insurance.

If There Is Other Insurance

If the insured person was in, on, getting into or out of a vehicle **you** do not own which is insured for this coverage under another policy, this coverage will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limit, **we** will only pay the amount by which the limit of liability of this policy exceeds the limit of liability of that policy.

If more than one policy applies to the accident on a primary basis, the total benefits payable to any one

AUTO *6100004991208170052823l6*

person will not exceed the maximum benefits payable under the policy with the highest limit for uninsured motorists coverage. **We** will bear our proportionate share with other uninsured motorists coverage. This applies no matter how many autos or auto policies may be involved whether written by **Allstate** or another company.

If more than one policy applies to the accident on an excess basis, the total benefits payable to any one person will not exceed the maximum benefits payable under the policy with the highest limit for excess uninsured motorist coverage. **We** will bear our proportionate share with other uninsured motorist coverage. This applies no matter how many autos or auto policies may be involved whether written by **Allstate** or another company.

Proof Of Claim; Medical Reports

As soon as possible any person making claim must give **us** written proof of claim. It must include all details **we** may need to determine the amounts payable. **We** may also require any person making claim to submit to questioning under oath and sign the transcript.

The insured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonable require. **We** must be given authorization to obtain medical reports and copies of records.

Assistance And Cooperation

We may require the insured person to take proper action to preserve all rights to recover damages from anyone responsible for the **bodily injury**.

Trust Agreement

When **we** pay any person under this coverage:

1. **we** are entitled to repayment of amounts paid by **us** and related collection expenses out of the proceeds of any settlement or judgment that such person recovers from any responsible party or insurer.
2. all rights of recovery against any responsible party or insurer must be maintained and preserved for **our** benefit.
3. insured persons, if **we** ask, must take proper action in their name to recover damages from any responsible party or insurer. **We** will select the attorney. **We** will pay all related costs and fees.

We will not ask the insured person to sue the insured of an insolvent insurer.

Payment Of Loss By Allstate

Any amount due is payable to the insured person, the parent or guardian of an injured minor, or to the spouse of any insured person who dies. However, **we** may pay any other person or estate lawfully entitled to recover the damages.

Action Against Allstate

No legal action can be brought against **us** under this coverage unless there is full compliance with all the policy terms or unless within one year from the date of the accident:

1. suit for **bodily injury** has been filed against the uninsured motorist in a court of competent jurisdiction,
2. agreement as to the amount due under this coverage has been concluded, or
3. formal arbitration proceedings have been instituted.

If a suit has been filed against the uninsured motorist, the insured person must provide **us** notice of the suit. The notice must be in writing and be provided within a reasonable time after the insured knew or should have known the motorist was uninsured. If **we** are prejudiced by a failure to give notice the claim will be denied. In no event will the notice be required before one year from the date of the accident.

If We Cannot Agree

If you and **we** disagree on your right to receive any damages or on the amount, then upon the written request of either party, the disagreement will be settled by a single neutral arbitrator.

If arbitration is used, any arbitration award will be binding and may be entered as a judgment in a proper court. All expenses of arbitration will be shared equally. However, attorney fees and fees paid to medical or other expert witnesses are not considered arbitration expenses and are to be paid by the party incurring them.

Arbitration will commence within one year from the date of the accident. No cause of action shall exist against either **you** or **Allstate** as a result of exercising the right to request arbitration of a claim.

Allstate Insurance Company

Allstate
You're in good hands

Part VII
Protection Against Loss To The Auto

The following coverages apply when indicated on the Policy Declarations. Additional payments, autos insured, definitions, exclusions, and other information applicable to all these coverages appear beginning on page 19.

COVERAGE DD
Auto Collision Insurance

Allstate will pay for direct and accidental loss to **your insured auto** or a **non-owned auto** (including insured loss to an attached trailer) from a collision with another object or by upset of that **auto** or trailer. The deductible amount won't be subtracted from the loss payment in collisions involving **your insured auto** and another **auto** insured by **us**.

Waiver Of Collision Coverage Deductible Option

The following applies only when the Policy Declarations indicate the Waiver of Collision Coverage Deductible Option:

The Auto Collision Insurance deductible will be waived to the extent that **you** are legally entitled to recover damages from the owner or operator of an uninsured **auto** if:

1. the damage is caused by direct physical contact between an uninsured **auto** as defined in Part VI—Uninsured Motorists Insurance of the policy, and a vehicle owned by **you** which is insured for Auto Collision Insurance under this policy; and
2. the owner or operator of the uninsured **auto** has been identified or the vehicle itself has been identified by its license number; and
3. **we** have been notified of the accident within 10 business days.

The Auto Collision Insurance deductible will not be waived when the damage is caused by an underinsured motor vehicle as defined in Part VI—Uninsured Motorists Insurance of this policy.

If We Cannot Agree

If **you** or **we** cannot agree on the amount of the Auto Collision Insurance deductible to be waived, then upon the written request of either, the disagreement will be settled by a single neutral arbitrator. Arbitration will be conducted within one year from the date of the accident. No cause of action shall exist against either **you** or **Allstate** from exercising the right to request arbitration for a claim for the Waiver of Collision Coverage Deductible.

COVERAGE HH
Auto Comprehensive Insurance

Allstate will pay for direct and accidental loss to **your insured auto** or a **non-owned auto** not caused by collision. Loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, and riot or civil commotion is covered. Glass breakage, whether or not caused by collision, and collision with a bird or animal is covered.

The deductible amount will not be subtracted from the loss payment when the loss is caused by a peril listed under Coverage HE.

By agreement between **you** and **Allstate**, the deductible amount will not be subtracted from a glass breakage loss if the glass is repaired rather than replaced.

COVERAGE HE
Auto Fire, Lightning and Transportation Insurance

Allstate will pay for direct and accidental loss to **your insured auto** or a **non-owned auto** due to:

1. fire or lightning.
2. smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the **auto** is located.
3. stranding, sinking, burning, collision or derailment of any conveyance in or upon which the **auto** is being transported on land or on water.

AUTO *6100004991206170052623I7*

Allstate Insurance Company

COVERAGE HF
Auto Theft Insurance
Allstate will pay for direct and accidental loss to **your** insured **auto** or a non-owned **auto** caused by theft or larceny.

COVERAGE HG
Auto Fire, Lightning, Transportation and Theft Insurance
Allstate will pay for direct and accidental loss to **your** insured **auto** or a non-owned **auto** caused by any peril listed under Coverages HE or HF above.

COVERAGE JJ
Towing And Labor Costs
Allstate will pay costs for labor done at the initial place of disablement of **your** insured **auto** or a non-owned **auto. We** will also pay for towing made necessary by the disablement. The total limit of **our** liability for each loss is shown on the Policy Declarations.

COVERAGE UU
Rental Reimbursement Coverage
If **you** have collision or comprehensive coverage under this policy and the loss involves either coverage, **Allstate** will reimburse **you** for **your** cost of renting an auto from a rental agency or garage. **We** will not pay more than the dollar amount per day, shown on the Policy Declarations. **We** won't pay mileage or fuel charges. **We** won't pay for collision damage waiver insurance charges.

If **your** insured **auto** is stolen, payment for transportation expenses will be made under the terms of paragraph 3. of "Additional Payments Allstate Will Make". However, the limits for this coverage will apply if they exceed the limits stated under "Additional Payments Allstate Will Make".

If **your** insured **auto** is disabled by a collision or comprehensive loss, coverage starts the day after the loss. If it is driveable, coverage starts the day after the **auto** is taken to a garage for repairs.

Coverage ends when whichever of the following occurs first:

1. if the **auto** is disabled by a collision or comprehensive loss, completion of repairs or replacement of the **auto;**
2. if the **auto** is stolen, when **we** offer settlement or **your auto** is returned to use; or
3. thirty full days of coverage.

COVERAGE ZA
Sound System Coverage
Allstate will pay for loss to a **sound system** permanently installed in **your auto** by bolts, brackets or other means, its antennas or other apparatus specifically used with that system.

Coverage ZA applies only if comprehensive insurance is in effect under this policy. This coverage makes **sound systems**, and antennas or other apparatus used specifically with them, insured property under the terms of both collision and comprehensive insurance. The limit of **our** liability is shown on the Policy Declarations.

COVERAGE ZZ
Tape Coverage
Allstate will pay for loss to any tapes or similar items used with any **auto** sound system. Coverage applies to property **you** or a **resident** relative own that is in or on **your** insured **auto** at the time of loss. The total limit of **our** liability for each loss is shown on the Policy Declarations.

This coverage applies only if **you** have comprehensive insurance under this policy. Coverage ZZ makes tapes or similar items insured property under **your** comprehensive insurance.

Additional Payments Allstate Will Make

1. **Allstate** will pay up to $200 for loss of clothing and personal luggage, including its contents, belonging to **you** or a **resident** relative while it is in or upon **your** insured **auto**. This provision does not apply if the insured **auto** is a **travel-trailer.**

   This coverage applies only when:
   a) the loss is caused by collision and **you** have purchased collision insurance.
   b) the entire **auto** is stolen, and **you** have purchased comprehensive insurance.
   c) physical damage is done to the **auto** and to the clothing and luggage caused by earthquake, explosion, falling objects, fire, lightning, or flood and **you** have purchased comprehensive insurance.
2. **Allstate** will repay **you** up to $10 for the cost of transportation from the place of theft of **your**

20

insured **auto** or disablement of the **auto** to **your** destination, if

a) the entire **auto** is stolen and **you** have comprehensive coverage under this policy.

b) the **auto** is disabled by a collision or comprehensive loss, and **you** have the coverage under this policy applicable to the loss.

This provision does not apply if the insured **auto** is a **travel-trailer.**

3. If **you** have comprehensive insurance under this policy, **Allstate** will repay up to $10 a day but not more than $300 for each loss for the cost of transportation when the entire **auto** is stolen. This coverage begins 48 hours after **you** report the theft to **us**, but ends when **we** offer settlement or **your auto** is returned to use.

4. If **you** have purchased collision or comprehensive insurance under this policy, **Allstate** will pay general average and salvage charges imposed when **your** insured **auto** is being transported.

Insured Autos

1. Any **auto** described on the Policy Declarations. This includes the four wheel private passenger **auto** or **utility auto you** replace it with if **you** notify **Allstate** within 30 days of the replacement and pay the additional premium. Coverage will not continue after 30 days if **we** are not notified of the replacement auto.

2. An additional four wheel private passenger **auto** or **utility auto you** acquire ownership of during the policy period will be covered for 30 days immediately after **you** become the owner.

However, **we** will provide this coverage only if **Allstate** or one of its affiliates insure all other private passenger **autos** or **utility autos you** own, and you pay the additional premium. Coverage will be continued beyond this 30 day period only if:

a) **you** ask **us** to continue coverage within 30 days after **you** acquire the **auto** or **utility auto you**;

b) **we** agree to continue coverage for this additional **auto** or **utility auto**;

c) **you** pay the additional premium.

3. A substitute four wheel private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, temporarily used with the permission of the owner while **your** insured **auto** is being serviced or repaired, or if **your** insured **auto** is stolen or destroyed.

4. A non-owned four wheel private passenger **auto**, a **utility auto**, a **motor home** or **travel-trailer** used by **you** or a **resident** relative with the owner's permission. These vehicles must not be available or furnished for the regular use of **you** or any **resident**.

5. A trailer while attached to an insured **auto**. This trailer must be designed for use with a private passenger **auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**. Home, office, store, display, or passenger trailers, **travel-trailers** or **camper units** are not covered unless described on the Policy Declarations.

Definitions

1. **"Allstate", "We", "Us", or "Our"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Camper Unit"**—means a demountable unit designed to be used as temporary living quarters, including all equipment and accessories built into and forming a permanent part of the unit. A camper unit does not include:

a) caps, tops, or canopies designed for use as protection of the cargo area of a **utility auto**; or

b) radio or television antennas, awnings, cabanas, or equipment designed to create additional off highway living facilities.

4. **"Motor Home"**—means a self-propelled vehicle equipped, designed or used as a living quarters.

5. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried

dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

6. **"Sound System"**—means any device within the insured **auto** designed for:
   a) voice, video or radar signal reception; or
   b) recording or playing back recorded material; or
   c) supplying power to cellular or similar equipment,

   and which is installed in a location other than the one designed by the auto's manufacturer for that device.

7. **"Travel-trailer"**—means a trailer of the house, cabin, or camping type equipped or used as a living quarters.

8. **"Utility Auto"**—means an **auto** of the pick-up body, sedan delivery or panel truck type. This **auto** must have a rated load capacity of not more than 2,000 pounds.

9. **"You"** or **"Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

Exclusions—What Is not covered

These coverages don't apply to:

1. loss caused intentionally by, or at the direction of, an insured person.

2. any **auto** used for the transportation of people or property for a fee. This exclusion does not apply to shared-expense car pools.

3. any damage or loss resulting from any act of war, insurrection, rebellion or revolution.

4. loss to any non-owned **auto** used in auto business operations such as repairing, servicing, testing, washing, parking, storing or selling of **autos**.

5. loss due to radioactive contamination.

6. damage resulting from wear and tear, freezing, mechanical or electrical breakdown unless the damage is the burning of wiring used to connect electrical components, or the result of other loss covered by this policy.

7. tires unless stolen or damaged by fire, malicious mischief or vandalism. Coverage is provided if the damage to tires occurs at the same time and from the same cause as other loss covered by this policy.

8. loss to any **sound system** within **your auto**.

   Coverages under this Part also will not apply to any apparatus in or on the **auto** designed for use with that system.

   This exclusion will not apply if **you** have purchased Coverage ZA.

9. loss to any tapes or similar items, unless **you** have Coverage ZZ under this policy.

10. loss to a **camper unit** whether or not mounted. This exclusion will not apply if the **camper unit** is described on the Policy Declarations.

11. loss to appliances, furniture, equipment and accessories that are not built into or forming a permanent part of a **motor home** or **travel-trailer.**

12. loss to **your motor home** or **your travel-trailer** while rented to anyone else unless a specific premium is shown on the Policy Declarations for the rented vehicle.

Right To Appraisal

Both **you** and **Allstate** have a right to demand an appraisal of the loss. Each will appoint and pay a qualified appraiser. Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they'll submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss.

Payment Of Loss By Allstate

Allstate may pay for the loss in money, or may repair or replace the damaged or stolen property at **our** option. **We** may, at any time before the loss is paid or the property is replaced, return at **our** own expense any stolen property, either to **you** or at **our** option to the address shown on the Policy Declarations, with payment for any resulting damage. **We** may take all or part of the property at

Allstate Insurance Company

Allstate
You're in good hands

the agreed or appraised value. **We** may settle any claim or loss either with **you** or the owner of the property.

If a loss or damage occurs which may require repair of the insured **auto** or replacement of any part(s) while the **auto** is in Mexican territory, the basis for adjustment of the claim will be as follows:

The repair or replacement costs will not exceed the cost of having the repairs or replacement made at the nearest point in the United States where the repairs or replacements can be made. The cost for towing, transportation and salvage operations of the **auto** while within Mexican territory are not covered under this policy.

Limits Of Liability

Allstate's limit of liability is the actual cash value of the property or damaged part of the property at the time of loss. The actual cash value will be reduced by the deductible for each coverage as shown on the Policy Declarations. However, **our** liability will not exceed what it would cost to repair or replace the property or part with other of like kind and quality. The limit for loss to any covered trailer not described on the Policy Declarations is $500.

An **auto** and attached trailer are considered separate **autos**, and **you** must pay the deductible, if any, on each. Only one deductible will apply to an **auto** with a mounted **camper unit**. If unmounted, a separate deductible will apply to the **auto** and **camper unit**.

The limit for loss to any non-owned **motor home** or **travel-trailer** is $10,000.

If There Is Other Insurance

If there is other insurance covering the loss at the time of the accident, **we** will pay only **our** share of any damages. Our share is determined by adding the limits of this insurance to the limits of all other insurance that applies on the same basis and finding the percentage of the total that **our** limits represent.

When this insurance covers a substitute **auto** or non-owned **auto**, **we** will pay only after all other collectible insurance has been exhausted.

When this insurance covers a replacement **auto** or additional **auto**, this policy won't apply if **you** have other collectible insurance.

If more than one policy applies on an excess basis, **we** will bear **our** proportionate share with other collectible excess insurance.

When more than one coverage is applicable to the loss, **you** may recover under the broadest coverage but not both. However, any Coverage ZA deductible will always apply.

Action Against Allstate

No one may sue **us** under this coverage unless there is full compliance with all the policy terms.

Subrogation Rights

When **we** pay, **your** rights of recovery from anyone else become **ours** up to the amount **we** have paid. **You** must protect these rights and help **us** enforce them.

What You Must Do If There Is A Loss

1. As soon as possible, any person making claim must give **us** written proof of loss. It must include all details reasonably required by **us**. **We** have the right to inspect the damaged property. **We** may require any person making claim to file with **us** a sworn proof of loss. **We** may also require that person to submit to examinations under oath.

2. Protect the **auto** from further loss. **We** will pay reasonable expenses to guard against further loss. If **you** don't protect the **auto**, further loss is not covered.

3. Report all theft losses promptly to the police.

IN WITNESS WHEREOF, **Allstate** has caused this policy to be signed by its Secretary and its President at Northbrook, Illinois, and, if required by state law, this policy shall not be binding unless countersigned on the Policy Declarations by an authorized agent of **Allstate**.

Secretary

President, Personal Lines

AUTO *610000499120817005282319*

Allstate Indemnity Company

Allstate
You're in good hands.

Policy Number: 6 27 540781 12/07 **Your Agent: Candy Raya (619) 691-8111**
Policy Effective Date: Dec. 7, 1999

Policy Endorsement

The following endorsement changes your policy. Please read this document carefully and keep it with your policy.

LOSS PAYABLE CLAUSE — AU2335

Loss or damage, if any, with respect to the **auto(s)** described on the Policy Declarations, under this policy will be payable as interest may appear to the Lienholder(s) shown on the Policy Declarations and this insurance to the interest of the Lienholder or other secured party will not be voided by any act or neglect of the owner of that auto, nor by any change in title or ownership of the auto. This clause is subject to the following provisions:

(1) The conversion, embezzlement or secretion by the owner or other person in possession of the insured **auto** is not covered under this policy, unless a specific premium is paid for that coverage. If the owner or other party neglects to pay the premium of this policy when due, then the Lienholder must pay, on demand, the premium to maintain coverage.

(2) The Lienholder must notify **us** of any change in ownership or increase of hazard that is known. The Lienholder must pay, on demand, the premium for any increase of hazard; otherwise, this policy will be null and void.

(3) **We** may cancel this policy according to its terms. **We** will notify the Lienholder at least ten days prior to the date of cancellation that the cancellation is effective as to the interest of the Lienholder. Allstate may cancel this agreement by similar notice to the Lienholder. The mailing of notice by **us** will be considered proof of notice.

(4) If the insured owner fails to render proof of loss within the time granted in the policy, the Lienholder must do so within sixty days in the form and manner described in the policy. The Lienholder is subject to the provisions of the policy relating to appraisal, time of payment and bringing suit.

(5) Whenever **we** pay the Lienholder any sum for loss or damage under this policy, **we** will be subrogated to the extent of payment to the rights of the party to whom payment was made. **We** may, at **our** option, pay the Lienholder the whole principal due or to grow due on the mortgage or other security agreement with interest, and receive in return a full assignment and transfer of the mortgage or other security agreement. However, these subrogation provisions must in no way impair the rights of the Lienholder to recover the full amount of its claim.

(6) Whenever a payment of any nature becomes due under this policy, separate payment may be made to each party at interest; provided **we** protect the equity of all parties.

AUTO *6100004991208170052823208*

24

Allstate Indemnity Company

Policy Number: 6 27 540781 12/07 Your Agent: Candy Reye (619) 691-8111
Policy Effective Date: Dec. 7, 1999

Policy Endorsement

The following endorsement changes your policy. Please read this document carefully and keep it with y
policy.

Amendment of Policy Provisions — California — AU2250-2

I. The General Provisions are amended as follows:

A. The following provision is added:

Fraud
This policy will not apply to any claim in which an insured person has concealed or misrepresente
any material fact or circumstance.

B. The **Cancellation** provision is replaced by the following:

Cancellation
You may cancel this policy by informing **us** of the future date **you** wish to stop coverage.

Allstate may cancel part or all of this policy by mailing notice to **you** at **your** last known address. If cancel because **you** didn't pay the premium, cancellation will be at least 10 days after the date of mailing. If **we** cancel for any reason other than non-payment of premium, **we** will give **you** notice a follows:

1. During the first 59 days the original policy is in effect, **we** will give **you** at least 10 days notice cancellation.

2. After the first 59 days, **we** will mail **you** at least 20 days notice of cancellation.

Proof of mailing the notice will be proof of notice.

If the policy is cancelled at **your** request during the original policy period, any refund due will be calculated using the Short Rate Table printed below. If the policy is cancelled because **you** didn't p the premium, this will be considered **your** request for cancellation for purposes of calculating any refund due. All other cancellations will be calculated in proportion to the time **your** policy has been effect. Cancellation will be effective even if the refund is not made immediately.

After **your** original policy has been in effect 59 days, **Allstate** won't cancel or reduce **your** coverag during the policy period unless:

1. **you** don't pay the premium when it's due;

2. there has been fraud or material misrepresentation affecting the policy or the insured; or

3. there has been a substantial increase in the hazard insured against.

Allstate Indemnity Company

Allstate You're in good hands

Policy Number: 6 27 540781 12/07 **Your Agent: Candy Raya (619) 691-8111**
Policy Effective Date: Dec. 7, 1999

SHORT RATE TABLE

Days Policy In Force	Percentage of Semi-Annual Premium	Days Policy In Force	Percentage of Semi-Annual Premium	Days Policy In Force	Percentage of Semi-Annual Premium	Days Policy In Force	Percentage of Semi-Annual Premium
1	6%	35-36	30%	79-80	54%	131-132	78%
2	7	37-38	31	81-82	55	133-134	79
3	8	39-40	32	83	56	135-136	80
4	9	41	33	84-85	57	137-139	81
5	10	42-43	34	86-87	58	140-141	82
6	11	44-45	35	88-89	59	142-143	83
7	12	46-47	36	90-91	(3 mos.) 60	144-145	84
8	13	48-49	37	92-93	61	146-148	85
9	14	50-51	38	94-95	62	149-150	(5 mos.) 86
10	15	52	39	96-98	63	151-152	87
11	16	53-54	40	99-100	64	153-155	88
12	17	55-56	41	101-102	65	156-157	89
13-14	18	57-58	42	103-104	66	158-159	90
15-16	19	59-60	(2 mos.) 43	105-107	67	160-161	91
17-18	20	61-62	44	108-109	68	162-164	92
19-20	21	63	45	110-111	69	165-166	93
21	22	64-65	46	112-114	70	167-168	94
22-23	23	66-67	47	115-116	71	169-171	95
24-25	24	68-69	48	117-118	72	172-173	96
26-27	25	70-71	49	119-120	(4 mos.) 73	174-175	97
28-29	26	72-73	50	121-123	74	176-177	98
30-31	(1 mo.) 27	74	51	124-125	75	178-180	99
32	28	75-76	52	126-127	76	181-183	(6 mos.) 100
33-34	29	77-78	53	128-130	77		

II. Part I, Automobile Liability Insurance (Coverages AA and BB), is amended as follows:

A. The **Insuring Agreement** is amended as follows:

Allstate will pay those damages an insured person is legally obligated to pay because of:

1. **bodily injury** sustained by any person, and
2. damage to, or destruction of property.

Under these coverages, **your** policy protects an insured person from liability for damage arising ou the ownership, maintenance or use, loading or unloading of an insured **auto**. Payments will be mad only for damages resulting from covered **bodily injury** and/or property damage.

We will defend an insured person sued for damages which are covered by this policy even if the su is groundless or false. **We** will choose the counsel. **We** may settle any claim or suit if **we** believe it i proper. **We** will not defend an insured person sued for damages which are not covered by this polic

B. Under **Insured Autos**, paragraph 4 is amended as follows:

4. A non-owned auto used by **you** or a **resident** relative with the owner's permission. This **auto** must not be owned by or available or furnished for the regular use of **you** or a **resident** relativ

C. Under **Exclusions—What is not covered**, exclusions 6 and 8 are replaced by the following:

AUTO *610000499120817005282921*

Pag

Allstate Indemnity Company

Policy Number: 8 27 540781 12/07 Your Agent: Candy Raya (619) 691-8111
Policy Effective Date: Dec. 7, 1999

6. **bodily injury** to an insured whenever the ultimate benefits of that indemnification accrue directl or indirectly to an insured.

8. **bodily injury** or property damage which may reasonably be expected to result from the intentional or criminal acts of the insured person or which are in fact intended by the insured person.

III. Part II, Automobile Medical Payments (Coverage CC), is amended as follows:

A. The **Insuring Agreement** is replaced by the following:

Insuring Agreement
Allstate will pay to or on behalf of an insured person all reasonable expenses the insured person becomes legally obligated to pay for necessary medical treatment, medical services or medical products actually provided to the insured person. Covered expenses may include ambulance, hospita medical, surgical, X-ray, dental, orthopedic and prosthetic devices, pharmaceutical, eyeglasses, hearing aids, funeral service expenses, and professional nursing services. Payments will be made onl when such expenses relate to **bodily injury** caused by an **auto** accident.

The treatment, services, or products must be rendered within one year after the accident. This will be extended to five years if the amount of insurance shown on the declarations page for this coverage is more than $5,000.

This coverage does not apply to any person to the extent that the treatment is covered under any worker's compensation law.

B. The following provision is added:

Our Right To Recover Payment
When **we** pay any person under this coverage:

1. **We** are entitled to reimbursement for amounts paid by **us** from the proceeds of any settlement or judgment the person recovers from a legally liable party or the party's insurer.

2. All rights of recovery against any legally liable party or the party's insurer must be maintained an preserved for **our** benefit.

IV. Part III, Coordinated Medical Protection (Coverage CX), is amended as follows:

The following provision is added:

Our Right To Recover Payment
When **we** pay any person under this coverage:

1. **We** are entitled to reimbursement for amounts paid by **us** from the proceeds of any settlement or judgment the person recovers from a legally liable party or the party's insurer.

2. All rights of recovery against any legally liable party or the party's insurer must be maintained an preserved for **our** benefit.

V. Part VI, Uninsured Motorists Insurance (Coverage SS), is amended as follows:

A. Under **An uninsured auto is**, paragraphs 2 and 4 are amended as follows:

2. a motor vehicle for which the insurer denies coverage, becomes insolvent within one year of the accident, or refuses to admit coverage except conditionally or with reservation.

4. an underinsured motor vehicle which has a bodily injury liability bond or bodily injury liability insurance in effect at the time of the accident, but in an amount less than the applicable bodily injury limit of liability for Uninsured Motorists Bodily Injury coverage shown on your declarations page.

B. Under **Limits of Liability**, paragraphs 5 and 6 are amended as follows:

5. Any loss payable under Coverage SS will be reduced by:
   a) all amounts payable under the bodily injury liability coverage provided by this policy
   b) all amounts payable under any workers' compensation law
   c) all amounts paid by the owner or operator of the underinsured motor vehicle or the insurer of the owner or operator.

6. Damages payable will be reduced by any amount paid or due under this or any other automobile policy for:
   a) medical payments coverage; or
   b) coordinated medical payments coverage; or
   c) any similar medical payments insurance.

C. The **Action Against Allstate** provision is replaced by the following:

Action Against Allstate
No legal action can be brought against **us** under this coverage unless there is full compliance with all the policy terms.

Legal action can be brought against **us** under this coverage if within one year from the date of the accident:

1. suit for bodily injury has been filed against the uninsured motorist in a court of competent jurisdiction, or

2. agreement as to the amount due under this coverage has been concluded, or

3. formal arbitration proceedings have been instituted and notice provided **us**.

If a suit has been filed against the uninsured motorist, the insured person must provide **us** notice of the suit. The notice must be in writing and be provided within a reasonable time after the insured knew or should have known the motorist was uninsured. If **we** are prejudiced by a failure to give notice the claim will be denied.

D. The **If We Cannot Agree** provision is replaced by the following:

If We Cannot Agree
If **you** and **we** disagree on your right to receive any damages or on the amount of damages, then upon written request of either party, the disagreement will be settled by a single neutral arbitrator.

If arbitration is used, any arbitration award will be binding up to your policy limits and may be entered as a judgment in a proper court. All expenses of arbitration will be shared equally. However, attorney fees and fees paid to medical or other expert witnesses are not considered arbitration expenses and are to be paid by the party incurring them.

AUTO *61000049912081700528232*

Allstate Indemnity Company

Policy Number: 6 27 540781 12/07 Your Agent: Candy Raya (619) 691-8111
Policy Effective Date: Dec. 7, 1999

No cause of action shall exist against either you or **Allstate** as a result of exercising the right to re(arbitration of a claim.

VI. Part VII, Protection Against Loss To The Auto, is amended as follows:

A. The **Waiver of Collision Coverage Deductible Option** is replaced by the following:

Waiver of Collision Coverage Deductible Option
The following applies only when the declarations indicate the Waiver of Collision Coverage Deduc Option:

The Auto Collision Insurance deductible will be waived if:

1. the damage is caused by direct physical contact between an uninsured **auto** as defined in Pa VI—Uninsured Motorists Insurance of the policy, and a vehicle owned by **you** which is insure Auto Collision Insurance under this policy; and

2. the owner or operator of the uninsured **auto** has been identified or the vehicle itself has been identified by its license number; and

3. **we** have been notified of the accident within 10 business days of the accident.

The Auto Collision Insurance deductible will not be waived when the damage is caused by an underinsured motor vehicle as defined in Part VI—Uninsured Motorists Insurance of this policy.

B. **Coverage UU, Rental Reimbursement Coverage**, is replaced by the following:

Coverage UU
Rental Reimbursement Coverage
If **you** have collision or comprehensive coverage under this policy and the loss involves either coverage, **Allstate** will reimburse **you** for **your** cost of renting an **auto** from a rental agency or gar **We** will not pay more than the dollar amount per day shown on the declarations page. **We** won't p mileage or fuel charges. **We** won't pay for collision damage waiver insurance charges.

If **your** insured **auto** is stolen, payment for transportation expenses will be made under the terms paragraph 3 of "Additional Payments Allstate Will Make". However, the limits for this coverage will apply if they exceed the limits stated under "Additional Payments Allstate Will Make".

If **your** insured **auto** is disabled by a collision or comprehensive loss, coverage starts the day of t loss. If it is drivable, coverage starts the day the **auto** is taken to a garage for repairs.

Coverage ends when whichever of the following occurs first:

1. If the **auto** is disabled by a collision or comprehensive loss, upon completion of the repairs, v **we** offer settlement on a total loss, or upon replacement of the **auto**;

2. If the **auto** is stolen, when **we** offer settlement or when **your auto** is returned to use; or

3. after thirty full days of coverage.

C. Under **Exclusions—What is not covered**, exclusion 1 is replaced by the following:

1. loss which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person.

D. The following exclusion is added to the policy:

Pa

Allstate Indemnity Company

Policy Number : 6 27 540781 12/07 **Your Agent: Candy Raya (619) 691-8111**
Policy Effective Date: Dec. 7, 1999

Policy Endorsement

The following endorsement changes your policy. Please read this document carefully and keep it with you policy.

Allstate Amendment of Policy Provisions — AU2285

This endorsement amends all of the following Allstate Insurance Company policies: Automobile, Motorcycle, an Motorhome. This endorsement is in addition to all other endorsements which apply to these policies.

It is agreed that the following provision is added to the General Provisions:

A. The following replaces the provision titled **Where And When The Policy Applies:**

Your policy applies only during the policy period. During this time, it applies to losses to the auto, accident and occurrences within the United States of America, its territories or possessions or Canada, or between their ports.

If we offer to renew your policy and your required premium payment isn't received when due, you will hav rejected our renewal offer. This means that the insurance coverage described in the renewal offer and any endorsements to the renewal offer will not become effective.

B. The following replaces the provision titled **Termination:**

If we offer to renew your policy and your required premium payment isn't received when due, you will hav rejected our renewal offer. This means that the insurance coverage described in the renewal offer and any endorsements to the renewal offer will not become effective.

C. The following provision is added:

Conditional Reinstatement
If we mail a cancellation notice because you didn't pay the required premium when due and you then tende payment by check, draft, or other remittance which is not honored upon presentation, your policy will terminate on the date and time shown on the cancellation notice and any notice we issue which waives the cancellation or reinstates coverage is void. This means that **Allstate** will not be liable under this policy for claims or damages after the date and time indicated on the cancellation notice.

D. Under the provision titled **Cancellation**, the following is added:

Any unearned premium amounts under $2.00 will be refunded only upon your request.

30

Allstate Indemnity Company

Allstate
You're in good hand

Policy Number : 6 27 540781 12/07 Your Agent: Candy Raye (619) 691-8111
Policy Effective Date: Dec. 7, 1999

13. loss to any auto due to confiscation by any government authority.

E. The following provision is added:

California Mandatory Vehicle Inspection for Physical Damage Coverage
You must notify **Allstate** immediately when you acquire an additional or replacement auto you wis insure for collision or comprehensive coverage under this policy.

Allstate or our authorized representative has the right to inspect any auto insured or intended to b insured under this policy before collision or comprehensive coverage becomes effective.

When an inspection is required by **us**, **you** must cooperate and make the auto available for the inspection.

When a required inspection is not completed within the time period specified, collision and comprehensive coverages applying to the uninspected auto will be restricted (coverage will be limi to the lienholder's interest) or suspended (coverage will not be afforded if no lienholder) effective 12:01 A.M. of the day following the date specified for completion of the inspection. Coverage will b restored as of the date and hour of the inspection as evidenced by the Automobile Inspection Repo

AUTO *6100004991208170052823Z3*

PROCURADURIA GENERAL DE JUSTICIA DEL ESTADO DE B.C.

Dirección de Averiguaciones Previas

Procuraduría General de Justicia del Estado del Estado de Baja California

PGJE

GOBIERNO DEL ESTADO LIBRE Y SOBERANO DE BAJA CALIFORNIA

Volante de Atención

AGENCIA INICIADORA-CONCILIADORA TIJUANA

AVE. RIO SUCHIATE 10036, COL. REVOLUCION, TIJUANA

No. Expediente: 10050/06/211/AP 4

Fecha de Incio: 20/10/2006 Hora: 18:46

Compareció: ORALIA MARTINEZ

Indiciado(s):	Fecha Detención:	Vencimiento Termino:
QUIEN RESULTE RESPONSABLE	00/00/0000 00:00	00/00/0000 00:00

Delito(s):

ROBO DE VEHICULO

Para seguimiento a su tramite acuda a la Agencia:

AGENCIA DEL MINISTERIO PUBLICO INVESTIGADORA DE DELITOS DE ROBO DE VEHICULOS

Domicilio:

AVENIDA MURUA MARTINEZ S/N FRACC. CHAPULTEPEC ALAMAR

Empleado que Atendió: Lic. MIRNA CERVANTES ROSAS

Procuraduría General de Justicia del Estado Baja California ESTADOS UNIDOS MEXICANOS

AGENCIA DEL MINISTERIO PUBLICO INICIADORA/CONCILIADORA ZONA CENTRO, TIJUANA, B C

32

T- 684700 -04

GOBIERNO DEL ESTADO LIBRE Y SOBERANO DE BAJA CALIFORNIA

PROCURADURIA GENERAL DE JUSTICIA DEL ESTADO DE B.C.

Dirección de Averiguaciones Previas

PGJE

DIRECCION DE AVERIGUACIONES PREVIAS

Reporte de Avance en Expediente

NO. DE EXPEDIENTE: 10050/06/211/AP Fecha y Hora de Impresión: 20/10/2006 19:11

OFENDIDO(S): ORALIA MARTINEZ

INDICIADO(S): QUIEN RESULTE RESPONSABLE

DELITO(S): ROBO DE VEHICULO

DATOS DE LOS HECHOS

FECHA Y HORA EN QUE OCURRIERON20/10/2006 00
DOMICILIO: TORIBIO ORTEGA NUMERO:
COLONIA: FRANCISCO VILLA
LUGAR:

NARRACION BREVE:
REPORTA EL ROBO DE VEHICULO MARCA GMC, ENVOY, TIPO VAGONETA, MODELO 2004, COLOR GRIS, NUMERO DE SERIE 1GKET16S446233737, EL CUAL ESTABA ESTACIONADO EN LA COLONIA FRANCISCO VILLA PERCATANDOSE DEL ROBO EL DIA DE HOY APROXMADAMENTE A LAS 17:30 HORAS

DATOS DE LA(S) PERSONA(S)

CALIDAD JURIDICA INDICIADO
NOMBRE QUIEN RESULTE RESPONSABLE
DOMICILIO NUMERO
COLONIA
MUNICIPIO TELEFONO
ESTADO
ESTADO CIVIL
OCUPACION
FECHA DE NACIM.

CALIDAD JURIDICA OFENDIDO
NOMBRE ORALIA MARTINEZ
DOMICILIO 15154 RANDALL AVE. FONTANA CA. 92 NUMERO
COLONIA FORANEA
MUNICIPIO TIJUANA TELEFONO 9098293198
ESTADO BAJA CALIFORNIA
ESTADO CIVIL CASADO
OCUPACION MAESTRO(A)
FECHA DE NACIM.06/02/1949

RELACION DELITOS COMETIDOS A OFENDIDOS POR INDICIADOS

OFENDIDO ORALIA. MARTINEZ

INDICIADO DELITO
QUIEN RESULTE RESPONSABLE. ROBO DE VEHICULO

DATOS DE LO(S) VEHICULOS(S)

REGISTRADO POR: REPORTADO ROBADO

MARCA	MODELO	PLACAS	COLOR
GMC,GMC	2004	5KHF036	GRIS

DILIGENCIAS	RESPONSABLE	FECHA ORDENO	SITUACION
BASE MINISTERIO PUBLICO			
ACUERDO DE RADICACION	MIRNA CERVANTES ROSAS	20/10/2006 18:	CONCLUIDA
DECLARACION DE OFENDIDO	MIRNA CERVANTES ROSAS	20/10/2006 18:	CONCLUIDA
CONSTANCIA DERECHOS DEL OFENDIDO	MIRNA CERVANTES ROSAS	20/10/2006 19:	INTEGRADA
FE MINISTERIAL	MIRNA CERVANTES ROSAS	20/10/2006 18:	PENDIENTE
ACUERDO PARA ORDEN DE INVESTIGACION	MIRNA CERVANTES ROSAS	20/10/2006 18:	PENDIENTE
ORDEN DE INVESTIGACION	MIRNA CERVANTES ROSAS	20/10/2006 18:	PENDIENTE

37

T-1020050 -04

AFFIDAVIT OF VEHICLE THEFT

(ALL QUESTIONS MUST BE ANSWERED OR THIS AFFIDAVIT MAY BE REJECTED)

CLAIM NO: 6934070160 IZG POLICY NO: 627540781

I. POLICYHOLDER

Name of Insured: Oralia Martinez
Address: 15154 Randall Ave.
City/ ST /Zip: Fontana Ca. 92335
Phone # (HM) (909)829 3198 (WK) (909)829-3198 Other: None
Drivers Lic #/ ST: B8465170/CA DOB: 02/06/49
Occupation: Babysitter / Supervisor
Name & Address of Employer: Christian & Sonia Carrillo / 10839 Begonia St. Adelanto, Ca. 92301 / Esc. Domingo Marquez y Marquez - Toribio Ortega #6301 Col. Fco. Villa, Tijuana, B.C. Mexico
Length of Employment: 5 years / 09/2006
Salary range $: 1-25000 (X) 25001-40000 ( ) 40001-70000 ( ) +70k ( )

Spouse or Other: None
Address:
City/ ST /Zip:
Phone # (HM) (WK) Other:
Drivers Lic #/ ST: DOB:
Occupation:
Name & Address of Employer:
Length of Employment:
Salary range $: 1-25000 ( ) 25001-40000 ( ) 40001-70000 ( ) +70k ( )

Any Separations or Divorces (YES/(NO)) If yes, give both names, dates of marriage & divorce & county

Have you ever filed for bankruptcy? Yes [ ] No [X] If yes, date

II. LOSS FACTS

Date of Theft: 10/20/06 Time: 5:00 AM/(PM) Was Vehicle Locked? YES/(NO) Were keys in or on vehicle? YES/(NO)
Address where vehicle was taken from: Toribio Ortega #6301 Col. Fco. Villa, Tijuana B.C. Mexico. Reason vehicle left there? I was working.
Name, Address & driver's license # of person leaving vehicle at this location: myself
If other, than the policyholder, did this person have permission to drive the vehicle? Yes/(No)
How did the person that last used the vehicle get home after the theft? with my husband
Name(s) & Address(es) of others who were present prior to the theft: None
Principal Use of Vehicle? personal Principal User? myself
Vehicle last parked? Date 10/20/06 Time 1:00 AM/(PM)
When was vehicle last seen? Date 10/20/06 Time 1:00 AM/(PM)
When was the theft discovered? Date 10/20/06 Time 1:00 AM/(PM) By Whom? myself
When was the theft reported to the police? Date 10/20/06 Time 5:00 AM/(PM) By Whom? myself
Police Dept. Notified: Procuraduria General de Justicia del Estado de B.C. Report #10050/06/211/AP Time 6:46 AM/(PM) By Whom? myself
How were police contacted? 911 / Non (Emergency #) Mexico 066
Was ignition locked? (Yes)/No Was car alarm on? (Yes)/No/No alarm Any other anti-theft devices in use? (Yes)/No Explain: Express Code / Express Standard Security System
How many sets of keys are there? 2 Are all sets in your possession? (YES) NO Who has other sets of keys? None
Has a copy of the key ever been made? Yes/(No) If yes, where: N/A
Any other insurance on this vehicle? YES/(NO) If yes, (Name & Address of Company and Agent) N/A
Has vehicle been recovered? YES/(NO) Date __/__/__ Where? Who recovered vehicle?
Condition of Vehicle: Present Location (Name, Address & Phone)
Who notified you of recovery?
Do you suspect anyone? YES/(NO) Who (Name(s) & Address) Have any arrests been made? YES / NO
Do you have knowledge of the whereabouts of the vehicle? Yes/(No) Explain:
Have you ever experienced a vehicle theft before? Yes/(No) If yes, list date(s) & type of vehicle:
Have you or the user of your vehicle had a drivers license canceled, refused or suspended? Yes/(No) If yes, explain:
Are you currently renting a vehicle? Yes/No If yes, from whom?
List any personal contents in vehicle when stolen? See attached worksheet

III. VEHICLE INFORMATION

Year: 2004 Make: GMC Truck Model: Envoy Edition: Body Type: Color: Charcoal
Vehicle Identification #: 1GKET16S446233737 License Plate #: 5KHF036 State: CA Year: 2007
Vehicle mileage: 43,000 Aprox. Titled (registered) Owner(s): Oralia Martinez
Date of Purchase: 9/19/04 (NEW)/USED Purchase Price $: 41,795.00 At the time of purchase was the vehicle damaged? YES/(NO)
If YES describe damage: Was it repaired YES/NO By whom? N/A
SELLER: Dealer / Individual (Name/ Address/ Phone): Ball Automotive Group.
How was vehicle paid for? CASH/ CHECK/ (FINANCED) If financed Name, Address, & Phone # of Company: GMAC
Account #: 611-90-55-99686 Is account past due? YES/(NO) If yes, how long?
Has the vehicle been offered for sale or trade within the last year? Yes/(No) Asking price: How was it advertised?
Any offers? Yes/No If yes, how much? If yes, from whom?

(Please turn over and complete the back of this form)

REV. 1/06/06

TRANSMISSION

Auto : OD Manual: 6spd 5spd 4spd 3spd

ENGINE SIZE: HP or CUBIC IN ______ # of Cylinders 3/ 4/ 6/ 8/ 10/ 12

Gas [ ] Diesel [ ] Turbo [ ]

34

POWER OPTIONS
All Wheel Drive- 4X4
Power Steering
Power Windows
Power Locks
Power Mirror(s)
Heated Mirrors
Cruise Control
Tilt Wheel
Rear Defogger
Air Conditioning
Dual Air Conditioner
Anti-Lock Brakes
Air Bag
Passenger Air Bag
Air Bag Other:
Power Antenna
Rear Window Wiper
Power Trunk Release

RA…S
AM Radio
AM/FM Stereo
AM/FM Tape
AM/FM Cass/CD
CD/DVD/VCR Player
CD Changer
Equalizer
Amplifier
Speakers Box
TV-Multi-Media
Navigation System
Alarm
Lojack / On-Star
Keyless Entry
Phone
CB Radio
Overhead Consol
Light Entry System

SEATS
Power Seat
Dual Power
Heated Seats
Split/ 60-40
Bucket
Cloth/Velour
Leather Seats
Vinyl Seats
Captain Chairs2

Paint/Trim/Glass
Two Tone
Graphics
Privacy Glass
Tinted Glass

ROOF
Vinyl Roof
Carriage Roof
Luggage Rack
Roll Bar/Lite Bar
Convertible Top
Hard Top

SUNROOF
Sliding Power
Sliding Manual
T-Top Glass
T-Top Solid

TRUCKS/VANS
Refrigerator
Microwave
TV (B&W)(CLR)
Full Pop-Top
½ Pop-Top

Rear Step…
Tube Bumper
Chrome Bumper
Chrome Step Bumper

WHEELS/TIRES
Wire Wheels
Wire Wheel Covers
Alloy
Chromed Alloy
Styled Steel
Manual Lock
Auto Lock Hubs

Trailer Tow Pkg.
Dual Rear Wheels
Camper Special
Trailer Hitch

OTHER
Grill Guard
Fog Lights
Winch
Canopy
CampShell
Bed Liner
Tool Box
ExtraTank
Lift Kit
Dash Mat
Ground Effects
Rear Spoiler
SlideRWindow
RunBoards
Exterior visor
BRA
Air Dam

Performance Equipment, List : ____________________

TRUCKS/VANS

Short Bed Long Bed TRUCK: Regular Cab/Ext Cab/Crew Cab Flairside/Stepside/Fleetside Van:Cargo/Passenger/Regular/Extended/Conv
Camper Top 1) Fiberglass 2) Aluminum Brand: ____________ Age: ________ Cost $ ____________.
Package: (i.e. XLT Scotsdale, Silverado, Mark III Vans etc.)____________

REFURBISHMENT (rebuilt, replaced, repainted or major repairs)

	Mileage at time of work	Cost	Who performed work?	Date	
Transmission					Receipt Attached Y/N
Engine					Receipt Attached Y/N
Wheels and Tires					Receipt Attached Y/N
Paint					Receipt Attached Y/N
Interior					Receipt Attached Y/N
Stereo					Receipt Attached Y/N

Vehicle Condition Prior to Theft: Upholstery/Interior: [ ] worn [ ] tears [ ] seams split [ ] dash cracked [ ] None of the listed
Exterior/Body: [ ] Door dings/scratches [ ] dents, location: __________ rust [ ] location: ________ [ ] None the listed
Paint : [ ] Faded [ ] Oxidized [ ] Peeling [ ]Primered [ ] None of the listed

VEHICLE CONDITION: (circle one)POOR FAIR GOOD (EXCELLENT)
Who performed regular maintenance? (Name, Address, Phone) Ball Automotive Group/1935 National City Blvd. National City Ca. 91950
Date last serviced 10/2006 What was done? Oil change
Any electrical/mechanical problems prior to the theft? Yes/(No) Explain: ____________
Who performed the last SMOG inspection? (CA) None Address ____________
Have there been other repairs done not listed above? Yes/(No) If yes, provide Name, Address, Phone: ____________
Does your title or registration state "Salvage" on it? Yes/(No)
To the best of your knowledge has this vehicle ever been declared a salvage vehicle? Yes/(No)
Have you ever applied for duplicate title on this vehicle? Yes/(No)
Has this vehicle ever been involved in any type of accident, vandalism or theft before this loss? Yes/(No) If yes, attach repair receipts if available and describe damage in full: ____________
Has this vehicle ever been involved in an organized or spontaneous racing or speed event? Yes/(No)

IV. POLICY INFORMATION

Present Agent Candy Raya How long insured with Allstate? 9/19/2004
Prior Insurance Co., Agent & Policy #(s) None
Have you ever been canceled, terminated or non-renewed by a prior insurance company? YES / NO If Yes, explain N/A

Any other vehicle(s) in household? (YES)/ NO If yes, Year, Make & Model Jeep Cheroke 1995/Dodge Omni 1982
Has other vehicle been damaged in past 3 years? YES /(NO) If yes, describe damage ____________
Were repairs completed? YES / NO If yes, by whom (Name & Address) N/A
Name & address of Insurance Company which paid for the damages? N/A

V. FOR YOUR PROTECTION, CALIFORNIA LAW REQUIRES THE FOLLOWING TO APPEAR ON THIS FORM: Any person who knowingly presents a false or fraudulent claim for the payment of a loss is guilty of a crime and may be subject to fines and confinement in state prison (California Insurance Code: 1879.2).

In accordance with California Insurance Code: 1871.3(a)(1): False representations made on the signed claim form by the insured subject the insured to a penalty of perjury.

Allstate Policy Provision: "Fraud – This policy will not apply to any claim in which an insured person has concealed or misrepresented any material fact or circumstance."

Print Name of Insured person completing the affidavit: ✓ Oralia Martinez

Signature must be witnessed by an Allstate Agent, Allstate Claim Adjuster or a Notary Public.

Signature of Insured person completing affidavit: Oralia Martinez Date 10/27/2006

If Agent/Claim Adjuster is witnessing signature, the Agent/Claims Adjuster must identify the person signing this affidavit by his/her drivers license # ____________

Print Name of Agent and Agent # or Claim Adjuster's Name____________

Signature of Agent/Claim Adjuster ____________ Date: ________

If Notary certifying signature, attach notary public certificate.

Subscribed & Sworn to before me, this 27th day of October 20 06

[signature]
Notary Public

My Commission Expires: 07/19, 20 09.

35

PLEASE RETURN WITH AFFIDAVIT

✓ All questions on Affidavit answered.

✓ Affidavit signed and signature notarized or witnessed by Allstate Agent.

___ Photograph of vehicle enclosed (if available).

N/A Original receipts for optional items on vehicle enclosed (such as: stereo, wheels, etc.) Photocopies are not acceptable.

✓ Bill of Sale or Sales Contract.

N/A Clothing/luggage data completed if claim being made.

Phone number where you can be reached during the day:

1) Name Oralia Martinez (909) 829-3198

2) Name ___ ( ) ___

3) Name ___ ( ) ___

4) Name ___ FAX( ) ___

Your auto policy allows for limited ***CLOTHING AND LUGGAGE*** items only (attach original receipts if available).

Description of Item	Date Purchased	Place Purchased	Purchase Price
N/A			

34

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of San Bernardino } ss.

On October 27, 2006 before me, Maria L. Rodriguez,
Date — Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared Oralia Martinez,
Name(s) of Signer(s)

~~☐ personally known to me~~
☒ proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

MARIA L. RODRIGUEZ
Commission # 1591784
Notary Public - California
San Bernardino County
My Comm. Expires Jul 19, 2009

WITNESS my hand and official seal.

[signature]
Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Affidavit of Vehicle Theft

Document Date: 10/27/06 Number of Pages: 1

Signer(s) Other Than Named Above: Ø

Capacity(ies) Claimed by Signer

Signer's Name: Oralia Martinez

- ☒ Individual
- ☐ Corporate Officer — Title(s): ______
- ☐ Partner — ☐ Limited ☐ General
- ☐ Attorney-in-Fact
- ☐ Trustee
- ☐ Guardian or Conservator
- ☐ Other: ______

Signer Is Representing: ______

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

© 1999 National Notary Association • 9350 De Soto Ave., P.O. Box 2402 • Chatsworth, CA 91313-2402 • www.NationalNotary.org Prod. No. 5907 Reorder: Call Toll-Free 1-800-876-6827

31

J. Manuel Sanchez, Esq. State Bar No. 74994
J. MANUEL SANCHEZ & ASSOCIATES
Attorneys at Law
482 W. San Ysidro Boulevard, Suite 3
San Ysidro, California 92173
Tel: (619) 662-2080
Fax: (619) 662-2048

Attorneys for Plaintiff Oralia Martinez

FILED
SOUTH COUNTY
2008 APR 11 PM 2:11
CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SOUTH COUNTY JUDICIAL DISTRICT

37-2008-00069884-CU-IC-SC

ORALIA MARTINEZ, Plaintiff, v. ALLSTATE INDEMNITY COMPANY, DOES 1 through 50, inclusive, Defendants.	CASE NO. GIS COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT, BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, UNFAIR CLAIM SETTLEMENT PRACTICES, INJUNCTIVE RELIEF, AND IMPROPER DISCLOSURE OF CONFIDENTIAL INFORMATION [UNLIMITED JURISDICTION] (Amount demanded exceeds $25,000)

Plaintiff Oralia Martinez alleges:

I

PARTIES

1. Plaintiff Oralia Martinez is now a resident of the County of San Diego, State of California.

2. Defendant ALLSTATE INDEMNITY COMPANY [ALLSTATE], is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California and authorized to transact, and transacting, business in California, as an automobile liability insurer.

3. Defendant ALLSTATE, is now, and at all times alleged in this complaint, has been, an insurer that is authorized to issue and deliver policies of insurance in the State of California.

4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 50, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged proximately were caused by their conduct.

5. Plaintiff is informed and believes and thereon alleges that at all times alleged in this complaint, Defendants, and each of them, were the agents, servants, and employees of each of the other defendants, and in committing the alleged acts, were acting within the course and scope of their employment and with the permission and consent of the other co-defendants.

II

COMMON ALLEGATIONS

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint as though fully set forth herein.

6. On or about September 19, 2004, Plaintiff purchased a policy of automobile insurance from Defendants, and each of them, bearing policy number 627 540 781, with effective dates of coverage of September 19, 2004. The policy was subsequently renewed with effective dates, which included coverage through the date of the loss of October 20, 2006, and subsequently thereafter, and at all times relevant to this action. A true and accurate copy of said policy of insurance is attached to this complaint as Exhibit "A."

7. Plaintiff is informed and believes, and thereon alleges, that said policy of insurance was delivered by Defendants to Plaintiff in the State of California and that all premiums for the policy were paid in California.

8. Plaintiff Oralia Martinez is the named insured under said policy of insurance for losses suffered as a result of a covered risk occurring during the time at which the policy was in force.

9. The policy contained coverage against loss due to theft or larceny of an automobile.

10. On or about October 20, 2006, at approximately 1:00 p.m. Plaintiff parked and secured her 2004 GMC automobile on Toribio Ortega street outside her place of employment in

Tijuana, Mexico. When Plaintiff returned to her automobile at approximately 5:30 p.m. of that same day, Plaintiff discovered that her automobile had been stolen from where it was parked, all to Plaintiff's loss in the amount according to proof at the time of trial.

11. On or about October 20, 2006, at approximately 7:00 p.m., Plaintiff contacted the police department in Tijuana, Mexico, and reported the theft of her automobile. A true and accurate copy of said Police Report is attached to this complaint as Exhibit "B." Plaintiff attempted to file a report with the California Highway Patrol, but was informed by the California Highway Patrol that no further report was required.

12. On or about October 20, 2006, soon after the theft of her automobile, Plaintiff placed a telephone call from Tijuana, Mexico to ALLSTATE to report the theft of her automobile, and was informed that the report had been recorded and that she would be contacted by ALLSTATE for additional information.

13. On October 26, 2006, Defendant ALLSTATE was further notified of Plaintiff's claim, in the form of an Affidavit of Vehicle Theft, in the manner set forth in said policy of insurance, by submitting a written notification of the claim, and proof of loss, by mailing said claim to Defendants, and each of them. A true and accurate copy of said Affidavit of Vehicle is attached to this complaint as Exhibit "C." Subsequently thereto, Defendants acknowledged receipt of notification by sending a letter denying coverage to Plaintiff, dated May 17, 2007. A true and accurate copy of said letter denying coverage is attached hereto as Exhibit "D."

14. On or about January of 2007, Defendant ALLSTATE's agent, employee and attorney Richard O. Knapp of Knapp & Spurlock, LLP contacted Plaintiff via telephone, and informed Plaintiff that he was going to assist her in resolving her property claim, and requested that Plaintiff appear for a deposition, and that Plaintiff bring to the deposition, confidential bank statements and other bank records. Richard O. Knapp of Knapp & Spurlock, LLP led Plaintiff to believe that he was assisting Plaintiff with her property claim, and therefore, Plaintiff believed that she had a special and fiduciary relationship with Mr. Knapp, such that it was proper to comply with Mr. Knapp's request for the release of her confidential bank records.

15. Plaintiff is informed and believes and thereon alleges that Defendants, and each of

them, failed to conduct a prompt full and complete investigation of the facts and circumstances giving rise to the claims asserted in the notification of the claim and proof of loss. Subsequently, the Defendants, and each of them, denied coverage for the claim.

16. Plaintiff is informed and believes and thereon alleges that the Defendants, and each of them, failed and refused to:

A. Conduct a proper, full and complete investigation of the claim in addition to those matters asserted in the notification of claim and supported by the proof of loss, submitted by Plaintiff to Defendants;

B. Conduct a further investigation after rejecting the claim and being advised by Plaintiff that Defendants had failed to conduct a complete investigation and that further information was available into the circumstances giving rise to the claim;

C. Advise Plaintiff in a timely manner of the status of the claim and the need for further information and additional time to investigate and respond to Plaintiff's claim; and

D. Promptly respond to communications with respect to the claim.

17. If Defendants had fulfilled their obligations as set forth in paragraphs 14 through 17 above, Defendants would have learned the following facts:

E. That Plaintiff's automobile was stolen;

F. That the witnesses did not identify Plaintiff's sons as the persons who committed the theft of Plaintiff's automobile;

G. That Plaintiff's automobile was not stolen by her sons;

H. That Plaintiff had absolutely no involvement in the theft of her automobile;

I. That Plaintiff did not in any way contribute to the theft of her automobile; and

J. That Plaintiff fully complied with the requirements under the policy.

K. Defendant ALLSTATE's agent, employee and attorney Richard O. Knapp of Knapp & Spurlock, LLP improperly and wrongfully requested confidential information from Plaintiff, including records pertaining to Plaintiff's bank statements and other financial records.

///

///

III

FIRST CAUSE OF ACTION
(Breach of Contract)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint and Paragraphs 6 through 17 of the Common Allegations of this Complaint as though fully set forth herein.

18. Plaintiff has duly performed each and every condition and obligation of the policy of insurance issued by Defendants as required to be performed by Plaintiff.

19. Plaintiff paid all premiums due under the policy, submitted all proofs of loss required under the policy, and performed all other conditions the policy required her to perform.

20. Defendants, and each of them, failed and refused to perform their obligations under the policy in that they failed and refused to conduct a full and complete investigation of the claim, and refused to pay the benefits owing under the policy.

21. As a direct and proximate result of the breach by Defendants, and each of them, of their contractual duties, Plaintiff has incurred fees and costs in the loss of use of her automobile.

IV

SECOND CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, and Paragraphs 18 through 21 of the First Cause of Action of this Complaint as though fully set forth herein.

22. Defendants, and each of them, at all times had a duty to act fairly and in good faith to Plaintiff in carrying out its responsibilities under the policy of insurance.

23. Implicit in the duty of Defendants' obligation was to act fairly and in good faith with Plaintiff, and promptly investigate claims brought by it's insured and to make reasonable decisions.

24. Defendants breached the duty to act fairly and in good faith toward Plaintiff by:

A. Refusing to conduct further investigation after being informed that the initial information was incomplete and inaccurate;

B. Denying Plaintiff the coverage and benefits owing under the policy of insurance without regard to the provisions of the policy and the obligations imposed upon Defendants;

C. Basing its decision on coverage upon its desire to reduce or avoid its obligations to Plaintiff under the policy;

D. Denying Plaintiff's claim with the intention of coercing Plaintiff to forgo the benefits due under the policy;

E. False Accusations against Plaintiff with the intent to intimidate Plaintiff;

F. Delay in resolving the claim;

G. Forcing Plaintiff to Seek Legal Redress; and

H. Allowing ALLSTATE attorneys to take the depositions of Plaintiff and her husband without providing Plaintiff and her husband with their own attorneys, and improperly and wrongfully acquiring confidential information from Plaintiff.

25. As a direct and proximate result of Defendants' breach, Plaintiff has suffered damages consisting of costs and fees associated with the loss of her automobile.

26. As a further direct and proximate result of Defendants' breach, Plaintiff has incurred the attorney fees and costs necessary to obtain the benefits and rights to which she is entitled under the policy but which Defendants refused and failed to provide.

27. As a further direct and proximate result of Defendants' breach, Plaintiff has suffered, and continues to suffer, emotional and mental distress.

28. In committing the alleged acts, Defendants acted with oppression, fraud and malice. All of the alleged acts were performed or ratified by Defendants' managerial employees, who acted with knowledge that Defendants' conduct would cause Plaintiff harm. Plaintiff is therefore entitled to recover punitive damages in an amount according to proof at trial.

V

THIRD CAUSE OF ACTION
(Unfair Claims Settlement Practices)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, Paragraphs 18 through

21 of the First Cause of Action of this Complaint, and Paragraphs 22 through 28 of the Second Cause of Action of this Complaint as though fully set forth herein.

29. Defendants are engaged in the business of insurance in the State of California, and the policy was issued and delivered by Defendants to Plaintiff in the State of California.

30. Defendants committed the acts referred to above knowingly and as part of a general business practice of:

A. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

B. Failing to adopt and implement reasonable standards for the prompt investigation of claims;

C. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

D. Failing to affirm or deny coverage of claims within a reasonable time after investigation has been completed;

E. Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which the investigation has become reasonably clear;

G. Compelling insureds to institute litigation to recover amounts due under insurance policies by refusing to pay under the policy when the investigation has become reasonably clear;

H. Delaying the investigation or payment of claims by requiring the insured to submit to a preliminary claim report and then requiring the insured to submit to further interrogation, both containing substantially the same information;

I. Allowing ALLSTATE attorneys to take the depositions of Plaintiff and her husband without providing Plaintiff and her husband with their own attorneys;

31. These acts constitute violations of the Fair Claims Settlement Practices Regulations.

32. As a result of Defendants' violations, Plaintiff was deprived of payment under the policy, lost use of her automobile, and suffered emotional distress in an amount according to proof.

///

VI

FOURTH CAUSE OF ACTION
(Injunctive Relief and Restitution)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, Paragraphs 18 through 21 of the First Cause of Action of this Complaint, Paragraphs 22 through 28 of the Second Cause of Action of this Complaint and Paragraphs 29 through 32 of the Third Cause of Action of this Complaint as though fully set forth herein.

33. Plaintiff is informed and believes that Defendants, and each of them, have engaged in and continue to engage in unlawful claims practices as alleged in paragraphs 1 through 31 above.

34. Plaintiff is informed and believes and thereon alleges that the insured of Defendants have been denied coverage and will continue to be denied coverage due to the unlawful claims practices of Defendants, and each of them.

35. Plaintiff is informed and believes and thereon alleges that no adequate remedy at law lies for Defendants' continuing violations.

VII

FIFTH CAUSE OF ACTION
(Improper Disclosure of Confidential Information)

Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of this Complaint, Paragraphs 6 through 17 of the Common Allegations of this Complaint, Paragraphs 18 through 21 of the First Cause of Action of this Complaint, Paragraphs 22 through 28 of the Second Cause of Action of this Complaint, Paragraphs 29 through 32 of the Third Cause of Action of this Complaint, and Paragraphs 33 through 35 of the Fourth Cause of Action of this Complaint as though fully set forth herein.

36. Plaintiff is informed and believes that at all times herein mentioned, Richard O. Knapp of Knapp & Spurlock, LLP was an agent, employee and attorney of Defendant ALLSTATE.

37. On or about January of 2007, Defendant ALLSTATE's agent, employee and attorney Richard O. Knapp of Knapp & Spurlock, LLP contacted Plaintiff via telephone and requested

that Plaintiff bring her confidential bank statements and other bank records to a deposition to be taken by Mr. Richard O. Knapp. Mr. Knapp misrepresented that he was going to assist Plaintiff with her property claim, lead Plaintiff to believe that she had a special and fiduciary relationship with Mr. Knapp, and improperly and wrongfully requested and acquired confidential bank records from Plaintiff. Plaintiff would not have released her confidential bank statements and other bank records to Mr. Knapp had she known that Defendant ALLSTATE's agent and employee Richard O. Knapp of Knapp & Spurlock, LLP was not her attorney, and was not representing her, or assisting her with her property claim.

38. As a result of Defendants ALLSTATE and their agents and employees, Defendants have in their possession certain confidential bank information concerning Plaintiff, to wit: bank statements and other financial records.

39. The improper and wrongful request for confidential bank records and the disclosure of the aforementioned bank records, unless enjoined and restrained by order of this court, will cause great and irreparable injury to Plaintiff in that if the information is further disclosed it will not be possible to restore its confidentiality.

40. Plaintiff has no adequate remedy at law for the injuries set forth herein because monetary damages cannot fully compensate Plaintiff for the invasion of her privacy that has been caused by the disclosure of the confidential information by Defendants, and each of them.

41. As a proximate result of Defendants' improper and wrongful disclosure of the aforementioned bank records and other conduct as mentioned above, Plaintiff has sustained damages according to proof.

42. As a further direct and proximate result of Defendants' improper and wrongful disclosure of confidential information, Plaintiff has incurred the attorney fees and costs.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

1. For damages in the sum according to proof for breach of contract;

2. For general and compensatory damages including, but limited to, injuries resulting from humiliation, mental anguish and emotional distress sum according to proof;

3. For attorneys' fees incurred in obtaining policy benefits, as provided by law;

4. For prejudgment interest in an amount to be proven at trial;

5. For Punitive and exemplary damages;

6. For a permanent injunction under the Fourth Cause of Action enjoining Defendants, their agents, successors and employees from unlawful claims practices, and under the Fifth Cause of Action enjoining Defendants, their agents, successors and employees from further disclosing and using Plaintiff's confidential bank records;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

Dated: April 11, 2008

J. Manuel Sanchez & Associates

By: ______________________
J. Manuel Sanchez, Esq.
Attorneys for Plaintiff
Oralia Martinez

RE: ORALIA MARTINEZ
Martinez v. Allstate

INDEX

EXHIBIT	DESCRIPTION	PAGE NUMBER
1	ALLSTATE AUTO INSURANCE POLICY	1-31
2	AFFIDAVIT OF VEHICLE THEFT WITH POLICE REPORT OF VEHICLE THEFT	32 - 37

EXHIBIT 1

Allstate
You're in good hands.

Allstate Auto Insurance Policy

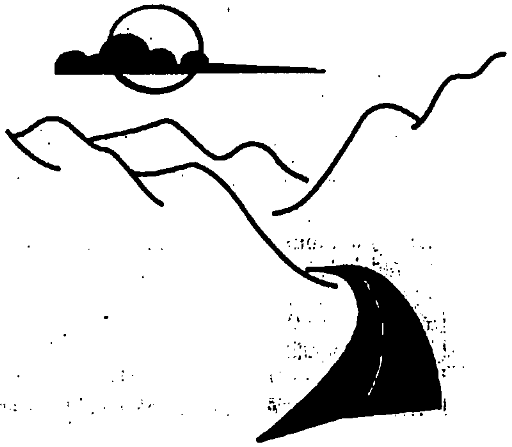
CALIFORNIA

Policy: 6 27 540781 12/07

Effective: December 7, 1999

Issued to:
Oralia Martinez
Apt 102
783 Brookstone Rd
Chula Vista CA 91913-2362

By your Allstate agent:
Candy Raya
1044 Broadway #A
Chula Vista CA 91911



AUTO *6100004991208170052823308*

AU104-3

TABLE OF CONTENTS

General 2
When And Where The Policy Applies 2
Limited Mexico Coverage 2
Premium Changes 2
Coverage Changes 2
Duty To Report Policy Changes 2
Combining Limits Of Two Or More Autos Prohibited 3
Transfer 3
Termination 3
Non Renewal 3
Cancellation 3
Part I — Automobile Liability Insurance Coverages AA and BB 4
Insuring Agreement 4
Additional Payments Allstate Will Make 4
Insured Persons 4
Insured Autos 4
Definitions 5
Exclusions — What is not covered 5
Financial Responsibility 6
Limits Of Liability 6
If There Is Other Insurance 6
Assistance And Cooperation 6
Action Against Allstate 6
Bankruptcy or Insolvency 6
What To Do In Case Of An Auto Accident Or Claim ... 7
Part II — Automobile Medical Payments Coverage CC 7
Insuring Agreement 7
Insured Persons 7
Insured Autos 7
Definitions 7
Exclusions — What is not covered 8
Limits Of Liability 8
Unnecessary or Unreasonable Medical Expenses 9
If There Is Other Insurance 9
Assistance And Cooperation 9
Action Against Allstate 9
Proof Of Claim; Medical Reports 9
Part III — Coordinated Medical Protection Coverage CX 9
Insuring Agreement 9
Deductible 10
Insured Persons 10
Insured Autos 10
Definitions 10
Exclusions — What is not covered 11
Limits Of Liability 11
Unnecessary or Unreasonable Medical Expenses ... 11
If There Is Other Automobile Medical Insurance 12

Assistance and Cooperation ....
Action Against Allstate ....
Proof of Claim; Medical Reports ....
Part IV — Automobile Death Indemnity Insuranc Coverage CM ....
Insuring Agreements ....
Insured Persons ....
Definitions ....
Exclusions — What is not covered ....
Payment Of Benefits; Autopsy ....
Consent Of Beneficiary ....
Proof Of Claim; Medical Reports ....
Part V — Automobile Disability Income Protectic Coverage CW ....
Insuring Agreement ....
Insured Persons ....
Definitions ....
Exclusions — What is not covered ....
To Whom And When Payment Is Made ....
Proof Of Claim; Medical Reports ....
Part VI — Uninsured Motorists Insurance Coverage SS ....
Insuring Agreement ....
Insured Persons ....
Definitions ....
Exclusions — What is not covered ....
Limits Of Liability ....
If There Is Other Insurance ....
Proof Of Claim; Medical Reports ....
Assistance And Cooperation ....
Payment Of Loss By Allstate ....
Action Against Allstate ....
If We Cannot Agree ....
Part VII — Protection Against Loss To The Auto Coverages DD, HH, HE, HF, HG, JJ, UU, ZA, ZZ ....
Insurance Agreements For Each Coverage ....
Waiver Of Collision Deductible Option ....
If We Cannot Agree ....
Additional Payments Allstate Will Make ....
Insured Autos ....
Definitions ....
Exclusions — What is not covered ....
Right To Appraisal ....
Payment Of Loss By Allstate ....
Limits Of Liability ....
If There Is Other Insurance ....
Action Against Allstate ....
Subrogation Rights ....
What You Must Do If There Is A Loss ....

Allstate Insurance Company

The Company Named in the Policy Declarations
A Stock Company
Home Office: Northbrook, Illinois

General

This policy is a legal contract between **you** and **us**. A coverage applies only when a premium for it is shown on the Policy Declarations. If more than one **auto** is insured, premiums will be shown for each **auto**. If **you** pay the premiums when due and comply with the policy terms, **Allstate**, relying on the information **you** have given **us**, makes the following agreements with **you**.

When And Where The Policy Applies

Your policy applies only during the policy period. During this time, it applies to losses to the **auto**, accidents and occurrences within the United States of America, its territories or possessions or Canada, or between their ports.

The policy period is shown on the Policy Declarations. If **we** offer to renew **your** policy, **you** may continue the policy for a successive policy period of six months by paying the required renewal premium payment when due. If the required renewal premium payment isn't received on or before the end of the then current policy period, **your** policy will terminate automatically on the expiration date of the then current policy period.

Limited Mexico Coverage

For **your** protection **you** should purchase insurance from a company licensed in Mexico. However, the coverage of this policy for an insured private passenger or **utility auto** is extended to cover that **auto** within the Republic of Mexico. This coverage applies only while the insured **auto** is within 75 miles of the United States border and only for a period not to exceed ten days after each separate entry into the Republic of Mexico.

If loss or damage occurs which may require repair of the insured **auto** or replacement of any part(s) while the **auto** is in Mexican territory, the basis for adjustment of the claim will be as follows:

The repair or replacement costs will not exceed the cost of having the repairs or replacements made at the nearest point in the United States where the repairs or replacements can be made. The cost for towing, transportation and salvage operations of the **auto** while within Mexican territory are not covered under this policy.

WARNING

Unless **you** have auto insurance written by a Mexican insurance company, **you** may spend many hours or days in jail if **you** have an accident in Mexico. Insurance coverage should be secured from a company licensed under the laws of Mexico to write such insurance in order to avoid complications and possible penalties under the laws of Mexico, including the impoundment of **your auto**.

Changes

Premium Changes

The premium for each **auto** which **Allstate** agrees to insure based on information **Allstate** has received from **you** or other sources. **You** agree to cooperate with **us** in determining if this information is correct, if it is complete, and if it changes during the policy period. **You** agree that if this information changes or is incorrect or incomplete, **we** may adjust **your** premium accordingly during the policy period.

Coverage Changes

When **Allstate** broadens a coverage during the policy period without additional charge, **you** have the new feature if **you** have the coverage to which it applies. The new feature applies on the date the coverage change is effective in **your** state. Otherwise, the policy can be changed only by endorsement. Any change in **your** coverage will be made using the rules, rates and forms in effect, and on file if required, for **our** use in **your** state.

Duty To Report Policy Changes

Your policy was issued in reliance on the information **you** provided concerning **autos** and persons insured by the policy. To properly insure **your auto**, **you** should promptly notify **us** when **you** change **your** address or whenever any **resident** operators insured by **your** policy are added or deleted.

You must tell **us** within 30 days when **you** acquire a replacement **auto**. If **you** don't, certain coverages of this policy may not apply.

AUTO *610000499120817005282309*

Allstate Insurance Company

When you acquire an additional **auto**, **we** will provide 30 days of coverage immediately after **you** become the owner. However, **we** will provide this coverage only if:

1. **you** acquire the **auto** during the policy period;
2. **you** tell **us** within 30 days of acquiring the **auto**;
3. no other insurance policy provides coverage for the **auto**; and
4. **you** pay the additional premium.

We will not provide coverage for more than 30 days unless:

1. **you** ask **us** to insure the additional **auto** within 30 days after **you** become the owner;
2. **we** agree to provide the coverage **you** select for this **auto**; and
3. **you** pay the additional premium.

Combining Limits Of Two Or More Autos Prohibited

If **you** have two or more **autos** insured in **your** name and one of these **autos** is involved in an accident, only the coverage limits shown on the Policy Declarations for that **auto** will apply. When **you** have two or more **autos** insured in **your** name and none of them is involved in the accident, **you** may choose any single **auto** shown on the Policy Declarations and the coverage limits applicable to that **auto** will apply.

The limits available for any other **auto** covered by the policy will not be added to the coverage for the involved or chosen **auto**.

Transfer

This policy can't be transferred to anyone without our written consent. However, if **you** die, coverage will be provided until the end of the policy period for:

1. **your** legal representative while acting as such, and
2. persons covered on the date of **your** death.

Termination

If **we** offer to renew **your** policy and **your** required premium payment isn't received on or before the end of the then current policy period, **your** policy will terminate automatically on the expiration date of the then current policy period.

Non Renewal

If **we** don't intend to continue the policy beyond the current policy period, **we** will mail **you** notice at least 20 days before the end of the policy period.

Cancellation

You may cancel this policy by writing **us** the future date **you** wish to stop coverage.

Allstate may cancel part or all of this policy by mailing notice to **you** at **your** last known address. If **we** cancel because **you** didn't pay the premium, the date of cancellation will be at least 10 days after the date of mailing. If **we** cancel for any reason other than non-payment of premium, **we** will give **you** notice as follows:

1. During the first 60 days the original policy is in effect, **we** will give **you** 10 days notice of cancellation.
2. After the first 60 days, **we** will give **you** 20 days notice of cancellation.

Proof of mailing the notice will be proof of notice. A refund, if due, will be in proportion to the time **your** policy has been in effect. Cancellation will be effective even if the refund is not made immediately.

After **your** original policy has been in effect 60 days, **Allstate** won't cancel or reduce **your** coverage during the policy period unless:

1. **you** don't pay the premium when it's due;
2. **you** or any member of **your** household has had a driver's license suspended or revoked during the last 12 months; or
3. **Allstate** has mailed notice within the first 60 days that **we** don't intend to continue the policy.

Part I
Automobile Liability Insurance
Bodily Injury—Coverage AA
Property Damage — Coverage BB

Allstate will pay those damages which an **insured person** is legally obligated to pay because of:

1. **bodily injury**, sustained by any person, and
2. damage to, or destruction of, property.

Under these coverages, **your** policy protects an **insured person** from liability for damage arising out of the ownership, maintenance or use, loading or unloading of an **insured auto**.

We will defend an **insured person** sued for damages which are covered by this policy even if the suit is groundless or false. **We** will choose the counsel. **We** may settle any claim or suit if **we** believe it is proper. **We** will not defend an **insured person** sued for damages which are not covered by this policy.

Additional Payments Allstate Will Make

When **we** defend an **insured person** under this Part, **we** will pay:

1. up to $50 a day for loss of wages or salary if **we** ask that person to attend hearings or trials to defend against a **bodily injury** suit. **We** won't pay for loss of other income. **We** will pay other reasonable expenses incurred at **our** request.
2. court costs for defense.
3. interest accruing on damages awarded. **We** will pay this interest only until **we** have paid, offered, or deposited in court the amount for which **we** are liable under this policy. **We** will only pay interest on damages not exceeding **our** limits of liability.
4. premiums on appeal bonds and on bonds to release attachments, but not in excess of **our** limit of liability. **We** aren't required to apply for or furnish these bonds.

We will repay an **insured person** for:

1. the cost of any bail bonds required due to an accident or traffic law violation involving the use of the **insured auto**. **We** won't pay more than $300 per bond. **We** aren't required to apply for or furnish these bonds.
2. any expense incurred for first aid to others at the time of an **auto** accident involving the **insured auto**.

Insured Persons

1. While using **your insured auto**:
   a) **you**,
   b) any **resident**, and
   c) any other person using it with **your** permission.
2. While using a non-owned **auto**:
   a) **you**,
   b) any **resident** relative using a four wheel private passenger **auto** or **utility auto**.
3. Any other person or organization liable for the use of an **insured auto** if the **auto** is not owned or hired by this person or organization, provided the use is by an **insured person** under 1. or 2. above and then only for that person's acts or omissions.

Insured Autos

1. Any **auto** described on the Policy Declarations. This includes the four wheel private passenger **auto** or **utility auto you** replace it with.
2. An additional four wheel private passenger **auto** or **utility auto you** become the owner of during the policy period will be covered for 30 days immediately after **you** acquire it. However, **we** will provide this coverage only if **Allstate** or one of its affiliates insures all other private passenger **autos** or **utility autos you** own, and **you** pay the additional premium.

   Coverage will be continued beyond this 30 day period only if:
   a) **you** ask **us** to continue coverage within 30 days after **you** acquire the **auto** or **utility auto**;
   b) **we** agree to continue coverage for this additional **auto** or **utility auto**;
   c) **you** pay the additional premium.
3. A substitute four wheel private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, being temporarily used while **your**

AUTO *61000049912081700528231O*

Allstate Insurance Company

insured **auto** is being serviced or repaired, or if **your** insured auto is stolen or destroyed.

4. A non-owned **auto** used by **you** or a **resident** relative with the owner's permission. This **auto** must not be available or furnished for the regular use of **you** or a **resident** relative.

5. A trailer while attached to an insured **auto**. The trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**.

Definitions

1. **"Allstate", "We", "Us"**, or **"Our"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness, disease or death.

4. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

5. **"Utility Auto"**—means an **auto** of the pick-up body, sedan delivery or panel truck type. This **auto** must have a rated load capacity of not more than 2,000 pounds.

6. **"You"** or **"Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

Exclusions—What is not covered

Allstate will not pay for those damages which an insured person is legally obligated to pay because of:

1. **bodily injury** or property damage arising out of the use of **your** insured **auto** while used to carry persons or property for a charge, or any **auto you** are driving while available for hire by the public. This exclusion does not apply to shared-expense car pools or when the three following conditions are met:
   a) **you** are operating an **auto** as a volunteer service for a nonprofit charitable organization or a governmental agency; and
   b) **you** are transporting physically or mentally handicapped persons or persons 60 years of age or older; and
   c) **you** do not receive more than the amount allowed for by-law for reimbursement of actual miles driven.

2. **bodily injury** or property damage arising out of auto business operations such as repairing, servicing, testing, washing, parking, storing, or selling **autos**. This exclusion applies only if there is other collectible liability insurance available to that person with limits at least equal to the minimum requirements of the applicable Motor Vehicle Financial Responsibility law. However, if there is no other collectible liability insurance, the maximum payable under this policy is limited to the minimum requirements of the applicable Motor Vehicle Financial Responsibility law.

   However, coverage does apply to **you**, or a **resident** relative when using **your** insured **auto**.

3. **bodily injury** or property damage arising out of the use of a non-owned **auto** in any business or occupation of an insured person. However, this exclusion does not apply while **you**, **your** chauffeur, or domestic servant are using a private passenger **auto** or trailer.

4. **bodily injury** to an employee of any insured person arising in the course of employment. This exclusion does not apply to **your** domestic employee who is not required to be covered by a worker's compensation law or similar law.

5. **bodily injury** to a co-worker injured in the course of employment. This exclusion does not apply to **you**.

6. **bodily injury** to **you** or any **resident** of **your** household related to **you** by blood, marriage, or adoption whenever the ultimate benefits of this coverage would accrue directly or indirectly to **you** or any **resident** of **your** household related to **you** by blood, marriage or adoption.

Allstate Insurance Company

Allstate
You're in good hands

7. damage to or destruction of property an insured person owns, transports, is in charge of, or rents. An **auto** operated by an insured person is considered to be property in charge of an insured person. However, a private residence or a garage rented by that person is covered.

8. **bodily injury** or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person.

9. **bodily injury** or property damage which would also be covered under nuclear energy liability insurance. This applies even if the limits of that insurance are exhausted.

Financial Responsibility

When this policy is certified as proof under any motor vehicle financial responsibility law, this policy will comply with the provisions of that law.

Limits Of Liability

The limits shown on the Policy Declarations are the maximum **we** will pay for any single **auto** accident. The limit stated for each person for **bodily injury** is the maximum **we** will pay for damages because of **bodily injury** sustained by one person in any single **auto** accident, including damages sustained by anyone else as a result of the **bodily injury**. Subject to the limit for each person, the limit stated for each occurrence is the maximum **we** will pay for damages for **bodily injury** sustained by two or more persons in any single **auto** accident. For property damage, the limit applies to damages arising from each occurrence.

The liability limits apply to each insured **auto** as shown on the Policy Declarations. The insuring of more than one person or **auto** under this policy will not increase **our** liability limits beyond the amount shown for any one **auto**, even though a separate premium is charged for each **auto**. The limits also won't be increased if **you** have other auto insurance policies that apply.

There will be no duplication of payments made under the Bodily Injury Liability and Uninsured Motorists Coverage of this policy.

An **auto** and attached trailer are considered one **auto**. Also, an **auto** and a mounted camper unit, topper, cap or canopy are considered one **auto**.

If a single "each occurrence" limit is stated on the Policy Declarations for Automobile Liability Insurance, this limit will be the maximum amount of **Allstate's** liability for both **bodily injury** and property damage arising out of any one occurrence.

If There Is Other Insurance

If an insured person is using a substitute private passenger **auto** or non-owned **auto**, **our** liability insurance will be excess over other collectible insurance. If more than one policy applies on a primary basis to an accident involving **your** insured **auto**, **we** will bear **our** proportionate share with other collectible liability insurance.

If more than one policy applies on an excess basis, **we** will bear **our** proportionate share with other collectible excess liability insurance.

Assistance And Cooperation

When **we** ask, an insured person must cooperate with **us** in the investigation, settlement and defense of any claim or lawsuit. If **we** ask, that person must also help **us** obtain payment from anyone who may be jointly responsible.

We can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for bail bonds or first aid to others.

Action Against Allstate

No insured person may sue **us** under this coverage unless there is full compliance with all the policy terms.

If liability has been determined by judgment after trial, or by written agreement among the insured, the other person, and **us**, then whoever obtains this judgment or agreement against an insured person, may sue **us** up to the limits of this policy. However, no one has the right to join **us** in a suit to determine legal responsibility.

Bankruptcy or Insolvency

The bankruptcy or insolvency of an insured person or that person's estate won't relieve **us** of any obligation.

AUTO *61000049912081700S282311*

7

Allstate Insurance Company

What To Do In Case Of An Auto Accident Or Claim

If an insured person has an **auto** accident, **we** must be informed promptly of all details. If an insured person is sued as the result of an **auto** accident, **we** must be informed as soon as possible.

Part II
Automobile Medical Payments Coverage CC

Allstate will pay to or on behalf of an insured person all reasonable expenses actually incurred by an insured person for necessary medical treatment, medical services or medical products actually provided to the insured person. Ambulance, hospital, medical, surgical, X-ray, dental, orthopedic and prosthetic devices, pharmaceuticals, eyeglasses, hearing aids, and funeral service expenses, and professional nursing services are covered. Payments will be made only when **bodily injury** is caused by an **auto** accident.

The treatment, services, or products must be rendered within one year after the accident. This will be extended to five years if the amount of insurance shown on the Policy Declarations for this coverage is more than $5,000.

This coverage does not apply to any person to the extent that the treatment is covered under any workers compensation law.

Insured Persons

1. You and any **resident** relative who sustains **bodily injury** while in, on, getting into or out of, or when struck by an **auto** or trailer. The use of a non-owned **auto** must be with the owner's permission.

2. Any other person who sustains **bodily injury** while in, on, getting into or out of
   a) **your** insured **auto** while being used by **you**, a **resident** relative, or any other person with **your** permission.
   b) a non-owned **auto** if the injury results from **your** operation or occupancy.
   c) a non-owned **auto** if the injury results from the operation on **your** behalf by **your** private chauffeur or domestic servant.
   d) a non-owned private passenger **auto** or trailer if the injury results from the operation or occupancy by a **resident** relative.

The use of non-owned **autos** must be with the owner's permission.

Insured Autos

1. Any **auto** described on the Policy Declarations. This includes the four wheel private passenger **auto** or **utility auto** you replace it with.

2. An additional four wheel private passenger **auto** or **utility auto you** acquire ownership of during the policy period will be covered for 30 days immediately after you become the owner. However, **we** will provide this coverage only if **Allstate** or one of its affiliates insure all other private passenger **auto** or **utility autos you** own, and **you** pay the additional premium.

   Coverage will be continued beyond this 30 day period only if:
   a) **you** ask **us** to continue coverage within 30 days after **you** acquire the **auto** or **utility auto**;
   b) **we** agree to continue coverage for this additional **auto** or **utility auto**;
   c) **you** pay the additional premium.

3. A substitute four wheel private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, temporarily used while **your** insured **auto** is being serviced or repaired, or if **your** insured **auto** is stolen or destroyed.

4. A non-owned **auto** having not less than four wheels used with the owner's permission. This **auto** must not be available or furnished for the regular use of an insured person.

5. A trailer while attached to an insured **auto**. The trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**.

Definitions

1. **"Allstate"**, **"We"**, **"Us"**, or **"Our"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness, disease or death.

4. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

5. **"Utility Auto"**—means an **auto** of the pickup body, sedan delivery or panel truck type. This **auto** must have a rated load capacity of not more than 2,000 pounds.

6. **"You"** or **"Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

Exclusions—What Is not covered

This coverage does not apply to **bodily injury** to:

1. **you** or a **resident** relative while in, on, getting into or out of an **auto you** or a **resident** relative own but do not insure for this coverage.

2. **you** or a **resident** relative while in, on, getting into or out of, or struck as a pedestrian by:
   a) a vehicle operated on rails or crawler-treads, or
   b) a vehicle or other equipment designed for use off public roads, while not on public roads.

3. any person while in, on, getting into or out of:
   a) an owned **auto** while available for hire to the public. This exclusion does not apply to shared-expense car pools.
   b) an **auto** or trailer while used as a residence or premises.

4. any person, other than **you** or a **resident** relative, while using a non-owned **auto**:
   a) which is available for hire by the public, or
   b) in **auto** business operations such as repairing, servicing, testing, washing, parking, storing or selling of **autos**.

   Coverage is provided for **you**, **your** private chauffeur or domestic servant while using a private passenger **auto** or trailer in any other business or occupation.

5. any person resulting from any act of war, insurrection, rebellion, or revolution.

Limits Of Liability

The limit shown on the Policy Declarations is the maximum **we** will pay for all expenses incurred by or for each person as the result of any one **auto** accident.

The medical payments limit applies to each insured **auto** as shown on the Policy Declarations. The insuring of more than one person or **auto** under this policy won't increase our limit beyond the amount shown for any one **auto**, even though a separate premium is charged for each **auto**. The limit also won't be increased if **you** have other auto insurance policies that apply.

If an insured person dies as the result of a covered **auto** accident, **we** will pay the least of the following as a funeral service expenses benefit:

1. $2,000; or

2. the Coverage CC limit of liability stated on the Policy Declarations; or

3. the remaining portion of the Coverage CC limit of liability not expended for other covered medical expenses.

This funeral service expenses benefit does not increase, and will not be paid in addition to, the limits of liability stated on the Policy Declarations for Coverage CC. This benefit is payable to the deceased insured person's spouse if a resident of the same household at the time of the accident. However, if the deceased is a minor, the benefit is payable to either parent if that parent is a resident of the same household at the time of the accident. In all other cases, the benefit is payable to the deceased insured person's estate.

There will be no duplication of payments made under the Bodily Injury Liability and Automobile Medical Payments coverages of this policy. All payments made to or on behalf of any person under this coverage will be considered as advance payments to that person. The damages payable under the Bodily Injury Liability coverage of this policy will be reduced by that amount.

AUTO *610000499120817005282312*

9

Allstate Insurance Company

Unnecessary or Unreasonable Medical Expenses

If the insured person incurs medical expenses which we deem to be unreasonable or unnecessary, we may refuse to pay those expenses and contest them. Unreasonable medical expenses are fees for medical services which are substantially higher than the usual and customary charges for those services. Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for treatment of the injury, including fees for an excessive number, amount, or duration of medical services.

If the insured person is sued by a medical services provider because we refuse to pay contested medical expenses, we will pay all defense costs and any resulting judgment against the insured person. We will choose the counsel. The insured person must cooperate with us in the defense of any claim or lawsuit. If we ask the insured person to attend hearings or trials, we will pay up to $50 per day for lost wages or salary. We will also pay other reasonable expenses incurred at our request.

If There Is Other Insurance

When this coverage applies to a substitute **auto** or non-owned **auto**, **Allstate** will pay only after all other collectible auto medical insurance has been exhausted.

When this coverage applies to a replacement **auto** or additional **auto**, this policy will not apply if **you** have other collectible auto medical insurance.

When this coverage applies to an owned **auto** insured by an affiliate of **Allstate** or any other insurer, **Allstate** will pay only after all other collectible **auto** medical insurance has been exhausted.

Assistance And Cooperation

When **we** ask, an insured person must cooperate with **us** in the investigation, settlement and defense of any claim or lawsuit. If **we** ask, that person must also help **us** obtain payment from anyone who may be jointly responsible.

We can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for first aid to others.

Action Against Allstate

No one may sue **us** under this coverage unless there is full compliance with all the policy terms.

Proof Of Claim; Medical Reports

As soon as possible, any person making claim must give **us** written proof of claim. It must include all details **we** may need to determine the amounts payable. **We** may also require any person making claim to submit to questioning under oath and sign the transcript.

The injured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonably require. **We** must be given authorization to obtain medical reports and other records pertinent to the claim.

Part III
Coordinated Medical Protection
Coverage CX

Allstate will pay to or on behalf of an insured person all reasonable expenses incurred for necessary medical treatment, services, or products actually provided to an insured person. Ambulance, hospital, medical, surgical, X-ray, dental, orthopedic and prosthetic devices, pharmaceuticals, eyeglasses, hearing aids, funeral service expenses, and professional nursing services are covered. Payments will be made only when **bodily injury** is caused by an **auto** accident. The treatment, services, or products must be rendered within five years after the accident.

Coverage CX applies to **you** and **resident** relatives on an excess basis only. This means that **Allstate** will not be liable to the extent that any elements of loss covered under Coordinated Medical Protection are paid, payable or required to be provided to or on behalf of **you** or a **resident** relative under the provisions of any and all **primary medical plans**.

Coverage CX will apply on a primary basis to expenses for elements of loss which are not covered under the **primary medical plan** applicable to **you** or **resident** relatives.

Coverage CX does not apply to any person to the extent that the treatment is covered under any workers compensation law.

Allstate Insurance Company

Allstate
You're in good hands.

Deductible
If there is no **primary medical plan** covering you and **resident** relatives in effect on the date of the accident, **Allstate** will pay only when covered expenses for **you** or a **resident** relative exceed $2,000. **We** will then pay only the excess amount. This deductible applies to each person. This paragraph does not apply if coverage under the **primary medical plan** terminates within 30 days prior to the loss.

This deductible does not apply to funeral service expenses.

Insured Persons
1. You and any **resident** relative who sustains **bodily injury** while in, on, getting into or out of, or when struck by, an **auto** or trailer. The use of a non-owned **auto** must be with the owner's permission.

2. Any other person who sustains **bodily injury** while in, on, getting into or out of
   a) **your** insured **auto** while being used by **you**, a **resident** relative, or any other person with **your** permission.
   b) a non-owned **auto** if the injury results from **your** operation or occupancy.
   c) a non-owned **auto** if the injury results from the operation on **your** behalf by **your** private chauffeur or domestic servant.
   d) a non-owned private passenger **auto** or trailer if the injury results from the operation or occupancy by a **resident** relative.

   The use of non-owned **autos** must be with the owner's permission.

Insured Autos
1. Any **auto** described on the Policy Declarations. This includes the four wheel private passenger **auto** or **utility auto you** replace it with.

2. An additional four wheel private passenger **auto** or **utility auto you** acquire ownership of during the policy period will be covered for 30 days immediately after **you** become the owner. However, **we** will provide this coverage only if **Allstate** or one of its affiliates insure all other private passenger **autos** or **utility autos you** own, and **you** pay the additional premium.

   Coverage will be continued beyond this 30 day period only if:
   a) **you** ask **us** to continue coverage within 30 days after **you** acquire the **auto** or **utility auto**;
   b) **we** agree to continue coverage for this additional **auto** or **utility auto**;
   c) **you** pay the additional premium.

3. A substitute four wheel private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, temporarily used while **your** insured **auto** is being serviced or repaired, or if **your** insured **auto** is stolen or destroyed.

4. A non-owned **auto** having not less than four wheels used with the owner's permission. This **auto** must not be available for the regular use of an insured person.

5. A trailer while attached to an insured **auto**. The trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**.

Definitions
1. **"Allstate"**, **"We"**, **"Us"**, or **"Our"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness, disease or death.

4. **"Primary Medical Plan"**—means individual, blanket or group accident disability, health, major medical or hospitalization insurance or a health maintenance organization which covers expenses on a primary basis for treatment, services and products required due to a **bodily injury** caused by an **auto** accident. The Federal Medicare program is not a primary medical plan.

5. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

AUTO *6100004991208170052823I3*

Allstate Insurance Company

6. **"Utility Auto"**—means an **auto** of the pickup body, sedan delivery or panel truck type. This **auto** must have a rated load capacity of not more than 2,000 pounds.

7. **"You"** or **"Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

Exclusions—What is not covered

This coverage does not apply to **bodily injury** to

1. **you** or a **resident** relative while in, on, getting into or out of an **auto you** or a **resident** relative own but do not insure for this coverage under this policy.

2. **you** or a **resident** relative while in, on, getting into or out of, or when struck as a pedestrian by:
   a) a vehicle operated on rails or crawler-treads, or
   b) a vehicle or other equipment designed for use off public roads while not on public roads.

3. any person while in, on, getting into or out of:
   a) an owned **auto** while available for hire to the public. This exclusion does not apply to shared-expense car pools.
   b) an **auto** or trailer while used as a residence or premises.

4. any person, other than **you** or a **resident** relative, while using a non-owned **auto**:
   a) which is available for hire by the public, or
   b) in auto business operations such as repairing, servicing, testing, washing, parking, storing or selling of **autos**.

   Coverage is provided for **you**, **your** private chauffeur or domestic servant while using a private passenger **auto** or trailer in any other business or occupation.

5. any person resulting from any act of war, insurrection, rebellion, or revolution.

Limits Of Liability

The limit shown on the Policy Declarations is the maximum **we** will pay for all expenses incurred by or for each insured person as the result of any one **auto** accident.

The medical payments limit applies to each insured **auto** as shown on the Policy Declarations. The insuring of more than one person or **auto** under this policy won't increase **our** limit beyond the amount shown for any one **auto**, even though a separate premium is charged for each **auto**. The limit also won't be increased if **you** have other auto insurance policies that apply.

If an insured person dies as the result of a covered auto accident, **we** will pay the least of the following as a funeral service expenses benefit:

1. $2,000; or

2. the remaining portion of the Coverage CX limit of liability not expended for other covered medical expenses.

This funeral service expenses benefit does not increase, and will not be paid in addition to, the limits of liability stated on the Policy Declarations for Coverage CX. This benefit is payable to the deceased insured person's spouse if a resident of the same household at the time of the accident. However, if the deceased is a minor, the benefit is payable to either parent if that parent is a resident of the same household at the time of the accident. In all other cases, the benefit is payable to the deceased insured person's estate.

There will be no duplication of payments made under the Bodily Injury Liability and Coordinated Medical Protection coverage of this policy. All payments made to or on behalf of any person under this coverage will be considered as advance payments to that person. The damages payable under the Bodily Injury Liability coverage of this policy will be reduced by that amount.

Unnecessary or Unreasonable Medical Expenses

If the insured person incurs medical expenses which **we** deem to be unreasonable or unnecessary, **we** may refuse to pay those expenses and contest them. Unreasonable medical expenses are fees for medical services which are substantially higher than the usual and customary charges for those services. Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for treatment of the injury, including fees for an excessive number, amount, or duration of medical services.

12

If the insured person is sued by a medical services provider because **we** refuse to pay contested medical expenses, **we** will pay all defense costs and any resulting judgment against the insured person. **We** will choose the counsel. The insured person must cooperate with **us** in the defense of any claim or lawsuit. If **we** ask the insured person to attend hearings or trials, **we** will pay up to $50 per day for lost wages or salary. **We** will also pay other reasonable expenses incurred at our request.

If There Is Other Automobile Medical Insurance

When this coverage applies to a substitute **auto** or a non-owned **auto**, **Allstate** will pay only after all other collectible auto medical insurance has been exhausted.

When this coverage applies to a replacement **auto** or additional **auto**, this policy will not apply if **you** have other collectible auto medical insurance.

When this coverage applies to an owned **auto** insured by an affiliate of **Allstate** or any other insurer, **Allstate** will pay only after all other collectible auto medical insurance has been exhausted.

Assistance and Cooperation

When **we** ask, an insured person must cooperate with **us** in the investigation, settlement and defense of any claim or lawsuit. If **we** ask, that person must also help us obtain payment from anyone who may be jointly responsible.

We can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for first aid to others.

Action Against Allstate

No one may sue **us** under this coverage unless there is full compliance with all the policy terms.

Proof of Claim; Medical Reports

As soon as possible, any person making claim must give **us** written proof of claim. It must include all details **we** may need to determine the amounts payable. **We** may also require any person making claim to submit to questioning under oath and sign the transcript.

The injured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonably require. **We** must be given authorization to obtain medical reports and other records pertinent to the claim.

Part IV
Automobile Death Indemnity Insurance
Coverage CM

Allstate will pay the benefit shown on the Policy Declarations if an insured person dies as the direct result of **bodily injury** caused by an **auto** accident. The injury must be sustained while the insured person is in, on, getting into or out of, or when struck as a pedestrian by an **auto**, trailer or semi-trailer.

Benefits will be paid only if:

1. death occurs within 90 days of the **auto** accident; or

2. death occurs within 1 year of the **auto** accident and the **bodily injury** has continuously prevented the insured person from performing all duties pertaining to that person's occupation.

Insured Persons

The person or persons shown as insured on the Policy Declarations under Coverage CM.

Definitions

1. **"Allstate"**, **"We"**, or **"Us"**—means the company as indicated on the Policy Declarations.

2. **"Auto"** — means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness or disease.

Exclusions—What Is not covered

This coverage does not apply to death:

1. sustained in the course of an occupation by any person while:
   a) operating, loading, unloading, assisting on, or performing any other duties related to the use of a commercial **auto**, or an **auto** hired or rented to others for a charge.

AUTO *6100004991208170052823I4*

13

b) repairing or servicing **autos**, including any related duties.

2. due to suicide committed while sane or insane.

3. due to any act of war, insurrection, rebellion, or revolution.

4. sustained while in, on, getting into or out of, or when struck as a pedestrian by
   a) a vehicle operated on rails or crawler-treads;
   b) a vehicle or other equipment designed for use off public roads, while not on public roads; or
   c) a vehicle when used as a residence or premises.

Payment Of Benefits; Autopsy

The benefit is payable to the deceased insured person's spouse. The spouse must be a resident of the same household as the insured person at the time of the accident. However, if the deceased is a minor, the benefit is payable to either parent. That parent must be a resident of the same household as the minor at the time of the accident. In all other cases, the benefit is payable to the deceased insured person's estate.

Allstate has the right and must be given the opportunity to make an autopsy where it is not prohibited by law.

Consent Of Beneficiary

The beneficiary's consent is not required for cancellation, assignment, change of beneficiary, or any other change under this coverage.

Proof Of Claim; Medical Reports

As soon as possible, **we** must be given written proof of claim. It must include all details **we** may need to determine if benefits are payable.

We must be given authorization to obtain medical reports and copies of records.

Part V
Automobile Disability Income Protection
Coverage CW

Allstate will pay the weekly benefit shown on the Policy Declarations if an insured person sustains continuous total disability as a direct result of **bodily injury** caused by an **auto** accident. The injury must be sustained while in, on, getting into or out of, or when struck as a pedestrian by an **auto**, trailer or semi-trailer.

Benefits will be paid only while the insured person is alive and only if the disability:

1. commences within 20 days of the date of the accident; and

2. during the first year after commencement, continuously prevents the insured person from performing all duties pertaining to that person's occupation; and

3. during the second and subsequent years after commencement, continuously prevents the insured person from engaging in any occupation or employment for wage or profit.

Insured Persons

The person or persons shown as insured on the Policy Declarations under Coverage CW.

Definitions

1. **"Allstate", "We", or "Us"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Bodily Injury"**—means bodily injury, sickness or disease.

Exclusions—What Is not covered

This coverage does not apply to disability:

1. sustained in the course of an occupation by any person while:
   a) operating, loading, unloading, assisting on, or performing any other duties related to the use of a commercial **auto**, or an **auto** hired or rented to others for a charge.

b) repairing or servicing **autos**, including any related duties.

2. due to any attempt at suicide while sane or insane.

3. due to any act of war, insurrection, rebellion or revolution.

4. sustained while in, on, getting into or out of, or when struck as a pedestrian by
   a) a vehicle operated on rails or crawler-treads;
   b) a vehicle or other equipment designed for use off public roads, while not on public roads; or
   c) a vehicle when used as a residence or premises.

To Whom And When Payment Is Made

Weekly benefits are payable to the disabled insured person. Accrued weekly benefits are payable every four weeks. Any remaining balance is payable at termination of the disability period. Benefits end upon the death of the insured person.

Proof Of Claim; Medical Reports

As soon as possible, any person making claim must give **us** written proof of claim.

The injured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonably require. **We** must be given authorization to obtain medical reports and copies of records.

Part VI
Uninsured Motorists Insurance Coverage SS

We will pay those damages that an insured person is legally entitled to recover from the owner or operator of an uninsured auto because of:

1. **bodily injury** sustained by an insured person, and **property damage**.

2. **Property damage** is covered only if a separate limit is shown on the Policy Declarations for Uninsured Motorists Insurance—Property Damage.

The **bodily injury** or **property damage** must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto. **We** will not pay any punitive or exemplary damages.

The right to benefits and the amount payable will be decided by agreement between the insured person and **Allstate**. If an agreement can't be reached, the decision will be made by arbitration.

If an insured person sues a person believed responsible for the accident without **our** written consent, **we** aren't bound by any resulting judgment.

Insured Persons

1. **You** and any **resident** relative.

2. Any other person while in, on, getting into or out of an insured auto with **your** permission.

3. Any other person who is legally entitled to recover because of **bodily injury** to **you**, a **resident** relative, or an occupant of **your** insured auto with **your** permission.

An Insured auto is a motor vehicle:

1. described on the Policy Declarations. This includes the **motor vehicle you** replace it with.

2. **you** become the owner of during the premium period. This additional **motor vehicle** will be covered for 30 days immediately after **you** become the owner. However, **we** will provide this coverage only if **Allstate** or one of its affiliates insure all other private passenger **motor vehicles you** own, and **you** pay the additional premium. Coverage will be continued beyond this 30 day period only if:
   a) **you** ask **us** to continue coverage within 30 days after **you** acquire the **motor vehicle**;
   b) **we** agree to continue coverage for this additional **motor vehicle**;
   c) **you** pay the additional premium.

3. not owned by **you** or a **resident** relative if being temporarily used while **your** insured auto is being serviced or repaired, or if **your** insured auto is stolen or destroyed. The **motor vehicle** must be used with the owner's permission.

AUTO *610000499120817005282315*

Allstate Insurance Company

4. not owned by **you** or a **resident** relative, if being operated by **you** with the owner's permission. The **motor vehicle** can't be furnished for the regular use of **you** or any **resident** relative.

An insured auto is not a **motor vehicle** made available for public hire by an insured person. This restriction does not apply when the three following conditions are met:

1. **you** are operating an auto as a volunteer service for a non-profit charitable organization or governmental agency; and
2. **you** are transporting physically or mentally handicapped persons or persons 60 years of age or older; and
3. **you** do not receive more than the amount allowed for by state law for reimbursement of actual mileage driven.

An uninsured auto is:

1. a **motor vehicle** which has no bodily injury or property damage liability bond or insurance policy in effect at the time of the accident.
2. a **motor vehicle** for which the insurer denies coverage, becomes insolvent or refuses to admit coverage except conditionally or with reservation.
3. a hit-and-run **motor vehicle** which causes:
   a) **bodily injury** to an insured person by physical contact with the insured person or with a vehicle occupied by that person. The identity of the operator and the owner of the vehicle must be unknown. The accident must be reported within 24 hours to the proper authorities. **We** must be notified within 30 days.
   b) **property damage** by direct physical contact with the insured auto. The identity of the operator or the owner of the vehicle must be known or the vehicle itself must be identified by its license number. **We** must be notified within 10 business days. This coverage does not apply if the identified vehicle has applicable property damage insurance.

   If the insured person was occupying a vehicle at the time of the accident, **we** have a right to inspect it.

4. an underinsured **motor vehicle** which has a bodily injury liability bond or bodily injury liability insurance in effect and applicable at the time of the accident, but in an amount less than the applicable bodily injury limit of liability for Uninsured Motorists Bodily Injury coverage shown on the Policy Declarations.

An uninsured auto is not:

1. a **motor vehicle** that is lawfully self-insured.
2. a **motor vehicle** owned by any federal, state, or local government or agency.
3. a **motor vehicle** insured for bodily injury under Part I of this policy.

Definitions

1. **"Allstate", "We", "Us", or "Our"**—means the company as indicated on the Policy Declarations.
2. **"Bodily Injury"**—means bodily injury, sickness, disease or death.
3. **"Motor Vehicle"**—means a land motor vehicle or trailer other than
   a) a vehicle or other equipment designed or modified for use off public roads, while not on public roads, or
   b) a vehicle when used as a residence or premises.
4. **"Property Damage"**—means damage to or destruction of the insured auto, but does not include loss of use of the insured auto, damage to personal property contained in the insured auto or damage caused by an underinsured **motor vehicle**.
5. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.
6. **"You" or "Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

16

Allstate Insurance Company

Allstate
You're in good hands.

Exclusions—What Is not covered

Allstate will not pay any damages an insured person is legally entitled to recover because of:

1. **bodily injury** or **property damage** to any person who makes a settlement without **our** written consent.

2. **bodily injury** or **property damage** sustained while in, on, getting into or out of or when struck by an uninsured **motor vehicle** which is owned by **you** or a **resident** relative.

3. **bodily injury** or **property damage** sustained while in, on, getting into or out of a vehicle **you** own which is owned by **you** or a **resident** relative which is insured for this coverage under another policy.

4. **bodily injury** or **property damage**, if the payment would directly or indirectly benefit any workers compensation or disability benefits insurer, including a self-insurer, or directly benefit the United States, or any state or political subdivision.

Limits Of Liability

1. The coverage limit shown on the Policy Declarations for:
   a) "each person" is the maximum that **we** will pay for damages arising out of **bodily injury** to one person in any one **motor vehicle** accident, including all damages sustained by anyone else as a result of that **bodily injury**.
   b) "each accident" is the maximum that **we** will pay for damages arising out of **bodily injury** to two or more persons in any one **motor vehicle** accident. This limit is subject to the limit for "each person".
   c) "each accident" is the maximum that **we** will pay for **property damage** arising out of any one **motor vehicle** accident. Subject to this limit, **our** limit of liability for **property damage** will be the lessor of:
      1) the actual cash value of the insured auto; or
      2) the amount necessary to repair or replace the insured auto.

2. These limits are the maximum **Allstate** will pay for any one **motor vehicle** accident regardless of the number of:
   a) claims made;
   b) vehicles or persons shown on the Policy Declarations; or
   c) vehicles involved in the accident.

   The Uninsured Motorists Coverage limits apply to each insured **motor vehicle** as shown on the Policy Declarations.

3. The limits for Coverage SS will be reduced by all amounts paid by or on behalf of the owner or operator of the underinsured **motor vehicle**.

4. **We** are not obligated to make any payment for **bodily injury** under this coverage which arises out of the use of an underinsured **motor vehicle** until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been exhausted by payment of judgments or settlements.

5. Any loss payable under Coverage SS will be reduced by:
   a) all amounts payable under the bodily injury liability coverage provided by this policy.
   b) all amounts payable under any workers compensation law.

6. Subject to the limits of liability, damages payable will be reduced by any amount paid or due under this or any other automobile policy for:
   a) medical payments coverage; or
   b) coordinated medical payments coverage; or
   c) any similar medical payments insurance.

If There Is Other Insurance

If the insured person was in, on, getting into or out of a vehicle **you** do not own which is insured for this coverage under another policy, this coverage will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limit, **we** will only pay the amount by which the limit of liability of this policy exceeds the limit of liability of that policy.

If more than one policy applies to the accident on a primary basis, the total benefits payable to any one

AUTO *61000049912081700528231 6*

Allstate Insurance Company

person will not exceed the maximum benefits payable under the policy with the highest limit for uninsured motorists coverage. **We** will bear **our** proportionate share with other uninsured motorists coverage. This applies no matter how many autos or auto policies may be involved whether written by **Allstate** or another company.

If more than one policy applies to the accident on an excess basis, the total benefits payable to any one person will not exceed the maximum benefits payable under the policy with the highest limit for excess uninsured motorist coverage. **We** will bear **our** proportionate share with other uninsured motorist coverage. This applies no matter how many autos or auto policies may be involved whether written by **Allstate** or another company.

Proof Of Claim; Medical Reports

As soon as possible any person making claim must give **us** written proof of claim. It must include all details **we** may need to determine the amounts payable. **We** may also require any person making claim to submit to questioning under oath and sign the transcript.

The insured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonable require. **We** must be given authorization to obtain medical reports and copies of records.

Assistance And Cooperation

We may require the insured person to take proper action to preserve all rights to recover damages from anyone responsible for the **bodily injury**.

Trust Agreement

When **we** pay any person under this coverage:

1. **we** are entitled to repayment of amounts paid by **us** and related collection expenses out of the proceeds of any settlement or judgment that such person recovers from any responsible party or insurer.
2. all rights of recovery against any responsible party or insurer must be maintained and preserved for **our** benefit.
3. insured persons, if **we** ask, must take proper action in their name to recover damages from any responsible party or insurer. **We** will select the attorney. **We** will pay all related costs and fees.

We will not ask the insured person to sue the insured of an insolvent insurer.

Payment Of Loss By Allstate

Any amount due is payable to the insured person, the parent or guardian of an injured minor, or to the spouse of any insured person who dies. However, **we** may pay any other person or estate lawfully entitled to recover the damages.

Action Against Allstate

No legal action can be brought against **us** under this coverage unless there is full compliance with all the policy terms or unless within one year from the date of the accident:

1. suit for **bodily injury** has been filed against the uninsured motorist in a court of competent jurisdiction,
2. agreement as to the amount due under this coverage has been concluded, or
3. formal arbitration proceedings have been instituted.

If a suit has been filed against the uninsured motorist, the insured person must provide **us** notice of the suit. The notice must be in writing and be provided within a reasonable time after the insured knew or should have known the motorist was uninsured. If **we** are prejudiced by a failure to give notice the claim will be denied. In no event will the notice be required before one year from the date of the accident.

If We Cannot Agree

If **you** and **we** disagree on **your** right to receive any damages or on the amount, then upon the written request of either party, the disagreement will be settled by a single neutral arbitrator.

If arbitration is used, any arbitration award will be binding and may be entered as a judgment in a proper court. All expenses of arbitration will be shared equally. However, attorney fees and fees paid to medical or other expert witnesses are not considered arbitration expenses and are to be paid by the party incurring them.

Arbitration will commence within one year from the date of the accident. No cause of action shall exist against either **you** or **Allstate** as a result of exercising the right to request arbitration of a claim.

Part VII
Protection Against Loss To The Auto

The following coverages apply when indicated on the Policy Declarations. Additional payments, autos insured, definitions, exclusions, and other information applicable to all these coverages appear beginning on page 19.

COVERAGE DD
Auto Collision Insurance

Allstate will pay for direct and accidental loss to **your** insured **auto** or a non-owned **auto** (including insured loss to an attached trailer) from a collision with another object or by upset of that **auto** or trailer. The deductible amount won't be subtracted from the loss payment in collisions involving **your** insured **auto** and another **auto** insured by **us**.

Waiver Of Collision Coverage Deductible Option

The following applies only when the Policy Declarations indicate the Waiver of Collision Coverage Deductible Option:

The Auto Collision Insurance deductible will be waived to the extent that **you** are legally entitled to recover damages from the owner or operator of an uninsured **auto** if:

1. the damage is caused by direct physical contact between an uninsured **auto** as defined in Part VI—Uninsured Motorists Insurance of the policy, and a vehicle owned by **you** which is insured for Auto Collision Insurance under this policy; and

2. the owner or operator of the uninsured **auto** has been identified or the vehicle itself has been identified by its license number; and

3. **we** have been notified of the accident within 10 business days.

The Auto Collision Insurance deductible will not be waived when the damage is caused by an underinsured motor vehicle as defined in Part VI—Uninsured Motorists Insurance of this policy.

If We Cannot Agree

If **you** or **we** cannot agree on the amount of the Auto Collision Insurance deductible to be waived, then upon the written request of either, the disagreement will be settled by a single neutral arbitrator. Arbitration will be conducted within one year from the date of the accident. No cause of action shall exist against either **you** or **Allstate** from exercising the right to request arbitration for a claim for the Waiver of Collision Coverage Deductible.

COVERAGE HH
Auto Comprehensive Insurance

Allstate will pay for direct and accidental loss to **your** insured **auto** or a non-owned **auto** not caused by collision. Loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, and riot or civil commotion is covered. Glass breakage, whether or not caused by collision, and collision with a bird or animal is covered.

The deductible amount will not be subtracted from the loss payment when the loss is caused by a peril listed under Coverage HE.

By agreement between **you** and **Allstate**, the deductible amount will not be subtracted from a glass breakage loss if the glass is repaired rather than replaced.

COVERAGE HE
Auto Fire, Lightning and Transportation Insurance

Allstate will pay for direct and accidental loss to **your** insured **auto** or a non-owned **auto** due to:

1. fire or lightning.

2. smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the **auto** is located.

3. stranding, sinking, burning, collision or derailment of any conveyance in or upon which the **auto** is being transported on land or on water.

AUTO *61000049912081700528231 7*

Allstate Insurance Company

COVERAGE HF
Auto Theft Insurance
Allstate will pay for direct and accidental loss to **your insured auto** or a non-owned **auto** caused by theft or larceny.

COVERAGE HG
Auto Fire, Lightning, Transportation and Theft Insurance
Allstate will pay for direct and accidental loss to **your insured auto** or a non-owned **auto** caused by any peril listed under Coverages HE or HF above.

COVERAGE JJ
Towing And Labor Costs
Allstate will pay costs for labor done at the initial place of disablement of **your insured auto** or a non-owned **auto. We** will also pay for towing made necessary by the disablement. The total limit of **our** liability for each loss is shown on the Policy Declarations.

COVERAGE UU
Rental Reimbursement Coverage
If **you** have collision or comprehensive coverage under this policy and the loss involves either coverage, **Allstate** will reimburse **you** for **your** cost of renting an **auto** from a rental agency or garage. **We** will not pay more than the dollar amount per day, shown on the Policy Declarations. **We** won't pay mileage or fuel charges. **We** won't pay for collision damage waiver insurance charges.

If **your insured auto** is stolen, payment for transportation expenses will be made under the terms of paragraph 3. of "Additional Payments Allstate Will Make". However, the limits for this coverage will apply if they exceed the limits stated under "Additional Payments Allstate Will Make".

If **your insured auto** is disabled by a collision or comprehensive loss, coverage starts the day after the loss. If it is driveable, coverage starts the day after the **auto** is taken to a garage for repairs.

Coverage ends when whichever of the following occurs first:
1. if the **auto** is disabled by a collision or comprehensive loss, completion of repairs or replacement of the **auto**;
2. if the **auto** is stolen, when **we** offer settlement or **your auto** is returned to use; or
3. thirty full days of coverage.

COVERAGE ZA
Sound System Coverage
Allstate will pay for loss to a **sound system** permanently installed in **your auto** by bolts, brackets or other means, its antennas or other apparatus specifically used with that system.

Coverage ZA applies only if comprehensive insurance is in effect under this policy. This coverage makes **sound systems**, and antennas or other apparatus used specifically with them, insured property under the terms of both collision and comprehensive insurance. The limit of **our** liability is shown on the Policy Declarations.

COVERAGE ZZ
Tape Coverage
Allstate will pay for loss to any tapes or similar items used with any **auto** sound system. Coverage applies to property **you** or a **resident** relative own that is in or on **your insured auto** at the time of loss. The total limit of **our** liability for each loss is shown on the Policy Declarations.

This coverage applies only if **you** have comprehensive insurance under this policy. Coverage ZZ makes tapes or similar items insured property under **your** comprehensive insurance.

Additional Payments Allstate Will Make
1. **Allstate** will pay up to $200 for loss of clothing and personal luggage, including its contents, belonging to **you** or a **resident** relative while it is in or upon **your insured auto**. This provision does not apply if the insured **auto** is a **travel-trailer**.

   This coverage applies only when:
   a) the loss is caused by collision and **you** have purchased collision insurance.
   b) the entire **auto** is stolen, and **you** have purchased comprehensive insurance.
   c) physical damage is done to the **auto** and to the clothing and luggage caused by earthquake, explosion, falling objects, fire, lightning, or flood and **you** have purchased comprehensive insurance.
2. **Allstate** will repay **you** up to $10 for the cost of transportation from the place of theft of **your**

insured **auto** or disablement of the **auto** to **your** destination, if

a) the entire **auto** is stolen and **you** have comprehensive coverage under this policy.
b) the **auto** is disabled by a collision or comprehensive loss, and **you** have the coverage under this policy applicable to the loss.

This provision does not apply if the insured **auto** is a **travel-trailer**.

3. If **you** have comprehensive insurance under this policy, **Allstate** will repay up to $10 a day but not more than $300 for each loss for the cost of transportation when the entire **auto** is stolen. This coverage begins 48 hours after **you** report the theft to **us**, but ends when **we** offer settlement or **your auto** is returned to use.

4. If **you** have purchased collision or comprehensive insurance under this policy, **Allstate** will pay general average and salvage charges imposed when **your** insured **auto** is being transported.

Insured Autos

1. Any **auto** described on the Policy Declarations. This includes the four wheel private passenger **auto** or **utility auto you** replace it with if **you** notify **Allstate** within 30 days of the replacement and pay the additional premium. Coverage will not continue after 30 days if **we** are not notified of the replacement auto.

2. An additional four wheel private passenger **auto** or **utility auto you** acquire ownership of during the policy period will be covered for 30 days immediately after **you** become the owner.

   However, **we** will provide this coverage only if **Allstate** or one of its affiliates insure all other private passenger **autos** or **utility autos you** own, and you pay the additional premium. Coverage will be continued beyond this 30 day period only if:

   a) **you** ask **us** to continue coverage within 30 days after **you** acquire the **auto** or **utility auto you**;
   b) **we** agree to continue coverage for this additional **auto** or **utility auto**;
   c) **you** pay the additional premium.

3. A substitute four wheel private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, temporarily used with the permission of the owner while **your** insured **auto** is being serviced or repaired, or if **your** insured **auto** is stolen or destroyed.

4. A non-owned four wheel private passenger **auto**, a **utility auto**, a **motor home** or **travel-trailer** used by **you** or a **resident** relative with the owner's permission. These vehicles must not be available or furnished for the regular use of **you** or any **resident**.

5. A trailer while attached to an insured **auto**. This trailer must be designed for use with a private passenger **auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**. Home, office, store, display, or passenger trailers, **travel-trailers** or **camper units** are not covered unless described on the Policy Declarations.

Definitions

1. **"Allstate", "We", "Us", or "Our"**—means the company as indicated on the Policy Declarations.

2. **"Auto"**—means a land motor vehicle designed for use on public roads.

3. **"Camper Unit"**—means a demountable unit designed to be used as temporary living quarters, including all equipment and accessories built into and forming a permanent part of the unit. A camper unit does not include:
   a) caps, tops, or canopies designed for use as protection of the cargo area of a **utility auto**; or
   b) radio or television antennas, awnings, cabanas, or equipment designed to create additional off highway living facilities.
4. **"Motor Home"**—means a self-propelled vehicle equipped, designed or used as a living quarters.

5. **"Resident"**—means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried

AUTO *61000049912081700528231B*

Allstate Insurance Company

dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

6. **"Sound System"**—means any device within the insured **auto** designed for:
   a) voice, video or radar signal reception; or
   b) recording or playing back recorded material; or
   c) supplying power to cellular or similar equipment,

   and which is installed in a location other than the one designed by the auto's manufacturer for that device.

7. **"Travel-trailer"**—means a trailer of the house, cabin, or camping type equipped or used as a living quarters.

8. **"Utility Auto"**—means an **auto** of the pick-up body, sedan delivery or panel truck type. This **auto** must have a rated load capacity of not more than 2,000 pounds.

9. **"You"** or **"Your"**—means the policyholder named on the Policy Declarations and that policyholder's **resident** spouse.

Exclusions—What Is not covered

These coverages don't apply to:

1. loss caused intentionally by, or at the direction of, an insured person.

2. any **auto** used for the transportation of people or property for a fee. This exclusion does not apply to shared-expense car pools.

3. any damage or loss resulting from any act of war, insurrection, rebellion or revolution.

4. loss to any non-owned **auto** used in auto business operations such as repairing, servicing, testing, washing, parking, storing or selling of **autos**.

5. loss due to radioactive contamination.

6. damage resulting from wear and tear, freezing, mechanical or electrical breakdown unless the damage is the burning of wiring used to connect electrical components, or the result of other loss covered by this policy.

7. tires unless stolen or damaged by fire, malicious mischief or vandalism. Coverage is provided if the damage to tires occurs at the same time and from the same cause as other loss covered by this policy.

8. loss to any **sound system** within your **auto**.

   Coverages under this Part also will not apply to any apparatus in or on the **auto** designed for use with that system.

   This exclusion will not apply if **you** have purchased Coverage ZA.

9. loss to any tapes or similar items, unless **you** have Coverage ZZ under this policy.

10. loss to a **camper unit** whether or not mounted. This exclusion will not apply if the **camper unit** is described on the Policy Declarations.

11. loss to appliances, furniture, equipment and accessories that are not built into or forming a permanent part of a **motor home** or **travel-trailer**.

12. loss to **your motor home** or **your travel-trailer** while rented to anyone else unless a specific premium is shown on the Policy Declarations for the rented vehicle.

Right To Appraisal

Both you and **Allstate** have a right to demand an appraisal of the loss. Each will appoint and pay a qualified appraiser. Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they'll submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss.

Payment Of Loss By Allstate

Allstate may pay for the loss in money, or may repair or replace the damaged or stolen property at our option. **We** may, at any time before the loss is paid or the property is replaced, return at **our** own expense any stolen property, either to **you** or at **our** option to the address shown on the Policy Declarations, with payment for any resulting damage. **We** may take all or part of the property at the agreed or appraised value. **We** may settle any claim or loss either with **you** or the owner of the property.

If a loss or damage occurs which may require repair of the insured **auto** or replacement of any part(s) while the **auto** is in Mexican territory, the basis for adjustment of the claim will be as follows:

The repair or replacement costs will not exceed the cost of having the repairs or replacement made at the nearest point in the United States where the repairs or replacements can be made. The cost for towing, transportation and salvage operations of the **auto** while within Mexican territory are not covered under this policy.

Limits Of Liability

Allstate's limit of liability is the actual cash value of the property or damaged part of the property at the time of loss. The actual cash value will be reduced by the deductible for each coverage as shown on the Policy Declarations. However, **our** liability will not exceed what it would cost to repair or replace the property or part with other of like kind and quality. The limit for loss to any covered trailer not described on the Policy Declarations is $500.

An **auto** and attached trailer are considered separate **autos**, and **you** must pay the deductible, if any, on each. Only one deductible will apply to an **auto** with a mounted **camper unit**. If unmounted, a separate deductible will apply to the **auto** and **camper unit**.

The limit for loss to any non-owned **motor home** or **travel-trailer** is $10,000.

If There Is Other Insurance

If there is other insurance covering the loss at the time of the accident, **we** will pay only **our** share of any damages. Our share is determined by adding the limits of this insurance to the limits of all other insurance that applies on the same basis and finding the percentage of the total that **our** limits represent.

When this insurance covers a substitute **auto** or non-owned **auto**, **we** will pay only after all other collectible insurance has been exhausted.

When this insurance covers a replacement **auto** or additional **auto**, this policy won't apply if **you** have other collectible insurance.

If more than one policy applies on an excess basis, **we** will bear **our** proportionate share with other collectible excess insurance.

When more than one coverage is applicable to the loss, **you** may recover under the broadest coverage but not both. However, any Coverage ZA deductible will always apply.

Action Against Allstate

No one may sue **us** under this coverage unless there is full compliance with all the policy terms.

Subrogation Rights

When **we** pay, **your** rights of recovery from anyone else become **ours** up to the amount **we** have paid. **You** must protect these rights and help **us** enforce them.

What You Must Do If There Is A Loss

1. As soon as possible, any person making claim must give **us** written proof of loss. It must include all details reasonably required by **us**. **We** have the right to inspect the damaged property. **We** may require any person making claim to file with **us** a sworn proof of loss. **We** may also require that person to submit to examinations under oath.

2. Protect the **auto** from further loss. **We** will pay reasonable expenses to guard against further loss. If **you** don't protect the **auto**, further loss is not covered.

3. Report all theft losses promptly to the police.

IN WITNESS WHEREOF, **Allstate** has caused this policy to be signed by its Secretary and its President at Northbrook, Illinois, and, if required by state law, this policy shall not be binding unless countersigned on the Policy Declarations by an authorized agent of **Allstate**.

Secretary

Robert N. Gary

President, Personal Lines

AUTO *6100004991208170052823195*

Allstate Indemnity Company

Allstate
You're in good hands.

Policy Number: 6 27 540781 12/07 Your Agent: Candy Raya (619) 691-8111
Policy Effective Date: Dec. 7, 1999

Policy Endorsement

The following endorsement changes your policy. Please read this document carefully and keep it with your policy.

LOSS PAYABLE CLAUSE — AU2335

Loss or damage, if any, with respect to the **auto(s)** described on the Policy Declarations, under this policy will be payable as interest may appear to the Lienholder(s) shown on the Policy Declarations and this insurance to the interest of the Lienholder or other secured party will not be voided by any act or neglect of the owner of that **auto**, nor by any change in title or ownership of the **auto**. This clause is subject to the following provisions:

(1) The conversion, embezzlement or secretion by the owner or other person in possession of the insured auto is not covered under this policy, unless a specific premium is paid for that coverage. If the owner or other party neglects to pay the premium of this policy when due, then the Lienholder must pay, on demand, the premium to maintain coverage.

(2) The Lienholder must notify **us** of any change in ownership or increase of hazard that is known. The Lienholder must pay, on demand, the premium for any increase of hazard; otherwise, this policy will be null and void.

(3) **We** may cancel this policy according to its terms. **We** will notify the Lienholder at least ten days prior to the date of cancellation that the cancellation is effective as to the interest of the Lienholder. Allstate may cancel this agreement by similar notice to the Lienholder. The mailing of notice by **us** will be considered proof of notice.

(4) If the insured owner fails to render proof of loss within the time granted in the policy, the Lienholder must do so within sixty days in the form and manner described in the policy. The Lienholder is subject to the provisions of the policy relating to appraisal, time of payment and bringing suit.

(5) Whenever **we** pay the Lienholder any sum for loss or damage under this policy, **we** will be subrogated to the extent of payment to the rights of the party to whom payment was made. **We** may, at our option, pay the Lienholder the whole principal due or to grow due on the mortgage or other security agreement with interest, and receive in return a full assignment and transfer of the mortgage or other security agreement. However, these subrogation provisions must in no way impair the rights of the Lienholder to recover the full amount of its claim.

(6) Whenever a payment of any nature becomes due under this policy, separate payment may be made to each party at interest; provided **we** protect the equity of all parties.

AUTO *61000049912081700528232O*

24

Allstate Indemnity Company

Policy Number: 6 27 540781 12/07 Your Agent: Candy Raye (619) 691-8111
Policy Effective Date: Dec. 7, 1999

Policy Endorsement

The following endorsement changes your policy. Please read this document carefully and keep it with y policy.

Amendment of Policy Provisions — California — AU2250-2

I. The General Provisions are amended as follows:

A. The following provision is added:

Fraud
This policy will not apply to any claim in which an insured person has concealed or misrepresente any material fact or circumstance.

B. The **Cancellation** provision is replaced by the following:

Cancellation
You may cancel this policy by informing us of the future date you wish to stop coverage.

Allstate may cancel part or all of this policy by mailing notice to **you** at your last known address. If cancel because you didn't pay the premium, cancellation will be at least 10 days after the date of mailing. If **we** cancel for any reason other than non-payment of premium, **we** will give **you** notice a follows:

1. During the first 59 days the original policy is in effect, **we** will give **you** at least 10 days notice cancellation.

2. After the first 59 days, **we** will mail **you** at least 20 days notice of cancellation.

Proof of mailing the notice will be proof of notice.

If the policy is cancelled at your request during the original policy period, any refund due will be calculated using the Short Rate Table printed below. If the policy is cancelled because **you** didn't p the premium, this will be considered **your** request for cancellation for purposes of calculating any refund due. All other cancellations will be calculated in proportion to the time **your** policy has been effect. Cancellation will be effective even if the refund is not made immediately.

After **your** original policy has been in effect 59 days, **Allstate** won't cancel or reduce **your** coverag during the policy period unless:

1. you don't pay the premium when it's due;

2. there has been fraud or material misrepresentation affecting the policy or the insured; or

3. there has been a substantial increase in the hazard insured against.

Allstate Indemnity Company

Allstate
You're in good hands

Policy Number: 6 27 540781 12/07 Your Agent: Candy Raya (619) 691-8111
Policy Effective Date: Dec. 7, 1999

SHORT RATE TABLE

Days Policy In Force	Percentage of Semi-Annual Premium	Days Policy In Force	Percentage of Semi-Annual Premium	Days Policy In Force	Percentage of Semi-Annual Premium	Days Policy In Force	Percentage of Semi-Annual Premium
1	6%	35-36	30%	79-80	54%	131-132	78%
2	7	37-38	31	81-82	55	133-134	79
3	8	39-40	32	83	56	135-136	80
4	9	41	33	84-85	57	137-139	81
5	10	42-43	34	86-87	58	140-141	82
6	11	44-45	35	88-89	59	142-143	83
7	12	46-47	36	90-91	(3 mos.) 60	144-145	84
8	13	48-49	37	92-93	61	146-148	85
9	14	50-51	38	94-95	62	149-150	(5 mos.) 86
10	15	52	39	96-98	63	151-152	87
11	16	53-54	40	99-100	64	153-155	88
12	17	55-56	41	101-102	65	156-157	89
13-14	18	57-58	42	103-104	66	158-159	90
15-16	19	59-60	(2 mos.) 43	105-107	67	160-161	91
17-18	20	61-62	44	108-109	68	162-164	92
19-20	21	63	45	110-111	69	165-166	93
21	22	64-65	46	112-114	70	167-168	94
22-23	23	66-67	47	115-116	71	169-171	95
24-25	24	68-69	48	117-118	72	172-173	96
26-27	25	70-71	49	119-120	(4 mos.) 73	174-175	97
28-29	26	72-73	50	121-123	74	176-177	98
30-31	(1 mo.) 27	74	51	124-125	75	178-180	99
32	28	75-76	52	126-127	76	181-183	(6 mos.) 100
33-34	29	77-78	53	128-130	77		

II. Part I, Automobile Liability Insurance (Coverages AA and BB), is amended as follows:

A. The **Insuring Agreement** is amended as follows:

Allstate will pay those damages an insured person is legally obligated to pay because of:

1. **bodily injury** sustained by any person, and
2. damage to, or destruction of property.

Under these coverages, **your** policy protects an insured person from liability for damage arising ou the ownership, maintenance or use, loading or unloading of an insured **auto**. Payments will be mad only for damages resulting from covered **bodily injury** and/or property damage.

We will defend an insured person sued for damages which are covered by this policy even if the su is groundless or false. **We** will choose the counsel. **We** may settle any claim or suit if **we** believe it i proper. **We** will not defend an insured person sued for damages which are not covered by this poli

B. Under **Insured Autos**, paragraph 4 is amended as follows:

4. A non-owned auto used by **you** or a **resident** relative with the owner's permission. This auto must not be owned by or available or furnished for the regular use of **you** or a **resident** relativ

C. Under **Exclusions—What is not covered**, exclusions 6 and 8 are replaced by the following:

AUTO *6100004991208170052823321*

Allstate Indemnity Company

Policy Number: 6 27 540781 12/07 **Your Agent: Candy Reya (619) 691-8111**
Policy Effective Date: Dec. 7, 1999

6. **bodily injury** to an insured whenever the ultimate benefits of that indemnification accrue directl or indirectly to an insured.

8. **bodily injury** or property damage which may reasonably be expected to result from the intentional or criminal acts of the insured person or which are in fact intended by the insured person.

III. Part II, Automobile Medical Payments (Coverage CC), is amended as follows:

A. The **Insuring Agreement** is replaced by the following:

Insuring Agreement
Allstate will pay to or on behalf of an insured person all reasonable expenses the insured person becomes legally obligated to pay for necessary medical treatment, medical services or medical products actually provided to the insured person. Covered expenses may include ambulance, hospita medical, surgical, X-ray, dental, orthopedic and prosthetic devices, pharmaceutical, eyeglasses, hearing aids, funeral service expenses, and professional nursing services. Payments will be made onl when such expenses relate to **bodily injury** caused by an **auto** accident.

The treatment, services, or products must be rendered within one year after the accident. This will be extended to five years if the amount of insurance shown on the declarations page for this coverage is more than $5,000.

This coverage does not apply to any person to the extent that the treatment is covered under any worker's compensation law.

B. The following provision is added:

Our Right To Recover Payment
When **we** pay any person under this coverage:

1. **We** are entitled to reimbursement for amounts paid by **us** from the proceeds of any settlement or judgment the person recovers from a legally liable party or the party's insurer.

2. All rights of recovery against any legally liable party or the party's insurer must be maintained an preserved for **our** benefit.

IV. Part III, Coordinated Medical Protection (Coverage CX), is amended as follows:

The following provision is added:

Our Right To Recover Payment
When **we** pay any person under this coverage:

1. **We** are entitled to reimbursement for amounts paid by **us** from the proceeds of any settlement or judgment the person recovers from a legally liable party or the party's insurer.

2. All rights of recovery against any legally liable party or the party's insurer must be maintained an preserved for **our** benefit.

V. Part VI, Uninsured Motorists Insurance (Coverage SS), is amended as follows:

A. Under **An uninsured auto is**, paragraphs 2 and 4 are amended as follows:

Allstate Indemnity Company

Allstate® You're in good hands.

Policy Number: 6 27 540781 12/07 Your Agent: Candy Raye (619) 691-8111
Policy Effective Date: Dec. 7, 1999

2. a motor vehicle for which the insurer denies coverage, becomes insolvent within one year of the accident, or refuses to admit coverage except conditionally or with reservation.

4. an underinsured motor vehicle which has a bodily injury liability bond or bodily injury liability insurance in effect at the time of the accident, but in an amount less than the applicable bodily injury limit of liability for Uninsured Motorists Bodily Injury coverage shown on your declarations page.

B. Under **Limits of Liability**, paragraphs 5 and 6 are amended as follows:

5. Any loss payable under Coverage SS will be reduced by;
   a) all amounts payable under the bodily injury liability coverage provided by this policy
   b) all amounts payable under any workers' compensation law
   c) all amounts paid by the owner or operator of the underinsured motor vehicle or the insurer of the owner or operator.

6. Damages payable will be reduced by any amount paid or due under this or any other automobile policy for:
   a) medical payments coverage; or
   b) coordinated medical payments coverage; or
   c) any similar medical payments insurance.

C. The **Action Against Allstate** provision is replaced by the following:

Action Against Allstate
No legal action can be brought against us under this coverage unless there is full compliance with all the policy terms.

Legal action can be brought against us under this coverage if within one year from the date of the accident:
1. suit for bodily injury has been filed against the uninsured motorist in a court of competent jurisdiction, or

2. agreement as to the amount due under this coverage has been concluded, or

3. formal arbitration proceedings have been instituted and notice provided us.

If a suit has been filed against the uninsured motorist, the insured person must provide us notice of the suit. The notice must be in writing and be provided within a reasonable time after the insured knew or should have known the motorist was uninsured. If we are prejudiced by a failure to give notice the claim will be denied.

D. The **If We Cannot Agree** provision is replaced by the following:

If We Cannot Agree
If you and we disagree on your right to receive any damages or on the amount of damages, then upon written request of either party, the disagreement will be settled by a single neutral arbitrator.

If arbitration is used, any arbitration award will be binding up to your policy limits and may be entered as a judgment in a proper court. All expenses of arbitration will be shared equally. However, attorney fees and fees paid to medical or other expert witnesses are not considered arbitration expenses and are to be paid by the party incurring them.

AUTO *610000499120817005282322*

28

Allstate Indemnity Company

Policy Number : 8 27 540781 12/07 **Your Agent: Candy Raye (619) 691-8111**
Policy Effective Date: Dec. 7, 1999

No cause of action shall exist against either you or **Allstate** as a result of exercising the right to rec arbitration of a claim.

VI. Part VII, Protection Against Loss To The Auto, is amended as follows:

A. The **Waiver of Collision Coverage Deductible Option** is replaced by the following:

Waiver of Collision Coverage Deductible Option
The following applies only when the declarations indicate the Waiver of Collision Coverage Deduc Option:

The Auto Collision Insurance deductible will be waived if:

1. the damage is caused by direct physical contact between an uninsured **auto** as defined in Pa VI—Uninsured Motorists Insurance of the policy, and a vehicle owned by **you** which is insure Auto Collision Insurance under this policy; and

2. the owner or operator of the uninsured **auto** has been identified or the vehicle itself has been identified by its license number; and

3. **we** have been notified of the accident within 10 business days of the accident.

The Auto Collision Insurance deductible will not be waived when the damage is caused by an underinsured motor vehicle as defined in Part VI—Uninsured Motorists Insurance of this policy.

B. **Coverage UU, Rental Reimbursement Coverage**, is replaced by the following:

Coverage UU
Rental Reimbursement Coverage
If **you** have collision or comprehensive coverage under this policy and the loss involves either coverage, **Allstate** will reimburse **you** for your cost of renting an **auto** from a rental agency or gar **We** will not pay more than the dollar amount per day shown on the declarations page. **We** won't p mileage or fuel charges. **We** won't pay for collision damage waiver insurance charges.

If **your** insured **auto** is stolen, payment for transportation expenses will be made under the terms paragraph 3 of "Additional Payments Allstate Will Make". However, the limits for this coverage will apply if they exceed the limits stated under "Additional Payments Allstate Will Make".

If **your** insured **auto** is disabled by a collision or comprehensive loss, coverage starts the day of th loss. If it is drivable, coverage starts the day the **auto** is taken to a garage for repairs.

Coverage ends when whichever of the following occurs first:

1. If the **auto** is disabled by a collision or comprehensive loss, upon completion of the repairs, v **we** offer settlement on a total loss, or upon replacement of the **auto**;

2. If the **auto** is stolen, when **we** offer settlement or when **your auto** is returned to use; or

3. after thirty full days of coverage.

C. Under **Exclusions—What is not covered**, exclusion 1 is replaced by the following:

1. loss which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person.

D. The following exclusion is added to the policy:

Allstate Indemnity Company

Policy Number: 6 27 540781 12/07 Your Agent: Candy Raya (619) 691-8111
Policy Effective Date: Dec. 7, 1999

Policy Endorsement

The following endorsement changes your policy. Please read this document carefully and keep it with your policy.

Allstate Amendment of Policy Provisions — AU2285

This endorsement amends all of the following Allstate Insurance Company policies: Automobile, Motorcycle, and Motorhome. This endorsement is in addition to all other endorsements which apply to these policies.

It is agreed that the following provision is added to the General Provisions:

A. The following replaces the provision titled **Where And When The Policy Applies:**

Your policy applies only during the policy period. During this time, it applies to losses to the **auto**, accidents and occurrences within the United States of America, its territories or possessions or Canada, or between their ports.

If **we** offer to renew **your** policy and **your** required premium payment isn't received when due, **you** will have rejected **our** renewal offer. This means that the insurance coverage described in the renewal offer and any endorsements to the renewal offer will not become effective.

B. The following replaces the provision titled **Termination:**

If **we** offer to renew **your** policy and **your** required premium payment isn't received when due, **you** will have rejected **our** renewal offer. This means that the insurance coverage described in the renewal offer and any endorsements to the renewal offer will not become effective.

C. The following provision is added:

Conditional Reinstatement
If **we** mail a cancellation notice because **you** didn't pay the required premium when due and **you** then tender payment by check, draft, or other remittance which is not honored upon presentation, **your** policy will terminate on the date and time shown on the cancellation notice and any notice **we** issue which waives the cancellation or reinstates coverage is void. This means that **Allstate** will not be liable under this policy for claims or damages after the date and time indicated on the cancellation notice.

D. Under the provision titled **Cancellation**, the following is added:

Any unearned premium amounts under $2.00 will be refunded only upon **your** request.

30

Allstate Indemnity Company

Allstate
You're in good hand

Policy Number : 6 27 540781 12/07 Your Agent: Candy Raya (619) 691-8111
Policy Effective Date: Dec. 7, 1999

13. loss to any auto due to confiscation by any government authority.

E. The following provision is added:

California Mandatory Vehicle Inspection for Physical Damage Coverage
You must notify **Allstate** immediately when you acquire an additional or replacement auto you wis insure for collision or comprehensive coverage under this policy.

Allstate or our authorized representative has the right to inspect any auto insured or intended to b insured under this policy before collision or comprehensive coverage becomes effective.

When an inspection is required by us, you must cooperate and make the auto available for the inspection.

When a required inspection is not completed within the time period specified, collision and comprehensive coverages applying to the uninspected auto will be restricted (coverage will be limi to the lienholder's interest) or suspended (coverage will not be afforded if no lienholder) effective 12:01 A.M. of the day following the date specified for completion of the inspection. Coverage will b restored as of the date and hour of the inspection as evidenced by the Automobile Inspection Repo

AUTO *61000049912081700526232З*

GOBIERNO DEL ESTADO LIBRE Y SOBERANO DE BAJA CALIFORNIA

PROCURADURIA GENERAL DE JUSTICIA DEL ESTADO DE B.C.

Dirección de Averiguaciones Previas

Procuraduría General de Justicia del Estado del Estado de Baja California

PGJE

Volante de Atención

AGENCIA INICIADORA-CONCILIADORA TIJUANA

AVE. RIO SUCHIATE 10036, COL. REVOLUCION, TIJUANA

No. Expediente: 10050/06/211/AP 4

Fecha de Incio: 20/10/2006 Hora: 18:46

Compareció: ORALIA MARTINEZ

Indiciado(s):	Fecha Detención:	Vencimiento Termino:
QUIEN RESULTE RESPONSABLE	00/00/0000 00:00	00/00/0000 00:00

Delito(s):

ROBO DE VEHICULO

Para seguimiento a su tramite acuda a la Agencia:

AGENCIA DEL MINISTERIO PUBLICO INVESTIGADORA DE DELITOS DE ROBO DE VEHICULOS

Domicilio:

AVENIDA MURUA MARTINEZ S/N FRACC. CHAPULTEPEC ALAMAR

Empleado que Atendió: Lic. MIRNA CERVANTES ROSAS

Procuraduría General de Justicia del Estado Baja California ESTADOS UNIDOS MEXICANOS

AGENCIA DEL MINISTERIO PUBLICO INICIADORA/CONCILIADORA ZONA CENTRO, TIJUANA, B.C

32

T- 684700 -04

GOBIERNO DEL ESTADO LIBRE Y SOBERANO DE BAJA CALIFORNIA

PROCURADURIA GENERAL DE JUSTICIA DEL ESTADO DE B.C.

Dirección de Averiguaciones Previas

PGJE

DIRECCION DE AVERIGUACIONES PREVIAS

Reporte de Avance en Expediente

NO. DE EXPEDIENTE: 10050/06/211/AP Fecha y Hora de Impresión: 20/10/2006 19:11

OFENDIDO(S): ORALIA MARTINEZ

INDICIADO(S): QUIEN RESULTE RESPONSABLE

DELITO(S): ROBO DE VEHICULO

DATOS DE LOS HECHOS

FECHA Y HORA EN QUE OCURRIERON20/10/2006 00
DOMICILIO: TORIBIO ORTEGA NUMERO:
COLONIA: FRANCISCO VILLA
LUGAR:

NARRACION BREVE:
REPORTA EL ROBO DE VEHICULO MARCA GMC, ENVOY, TIPO VAGONETA, MODELO 2004, COLOR GRIS, NUMERO DE SERIE 1GKET16S446233737, EL CUAL ESTABA ESTACIONADO EN LA COLONIA FRANCISCO VILLA PERCATANDOSE DEL ROBO EL DIA DE HOY APROXMADAMENTE A LAS 17:30 HORAS

DATOS DE LA(S) PERSONA(S)

CALIDAD JURIDICA INDICIADO
NOMBRE QUIEN RESULTE RESPONSABLE
DOMICILIO NUMERO
COLONIA
MUNICIPIO TELEFONO
ESTADO
ESTADO CIVIL
OCUPACION
FECHA DE NACIM.

CALIDAD JURIDICA OFENDIDO
NOMBRE ORALIA MARTINEZ
DOMICILIO 15154 RANDALL AVE. FONTANA CA. 92 NUMERO
COLONIA FORANEA
MUNICIPIO TIJUANA TELEFONO 9098293198
ESTADO BAJA CALIFORNIA
ESTADO CIVIL CASADO
OCUPACION MAESTRO(A)
FECHA DE NACIM.06/02/1949

RELACION DELITOS COMETIDOS A OFENDIDOS POR INDICIADOS

OFENDIDO ORALIA. MARTINEZ

INDICIADO DELITO
QUIEN RESULTE RESPONSABLE. ROBO DE VEHICULO

DATOS DE LO(S) VEHICULOS(S)

REGISTRADO POR: REPORTADO ROBADO

MARCA	MODELO	PLACAS	COLOR
GMC,GMC	2004	5KHF036	GRIS

DILIGENCIAS	RESPONSABLE	FECHA ORDENO	SITUACION
BASE MINISTERIO PUBLICO			
ACUERDO DE RADICACION	MIRNA CERVANTES ROSAS	20/10/2006 18:	CONCLUIDA
DECLARACION DE OFENDIDO	MIRNA CERVANTES ROSAS	20/10/2006 18:	CONCLUIDA
CONSTANCIA DERECHOS DEL OFENDIDO	MIRNA CERVANTES ROSAS	20/10/2006 19:	INTEGRADA
FE MINISTERIAL	MIRNA CERVANTES ROSAS	20/10/2006 18:	PENDIENTE
ACUERDO PARA ORDEN DE INVESTIGACION	MIRNA CERVANTES ROSAS	20/10/2006 18:	PENDIENTE
ORDEN DE INVESTIGACION	MIRNA CERVANTES ROSAS	20/10/2006 18:	PENDIENTE

33

T-1020050 -04

AFFIDAVIT OF VEHICLE THEFT

(ALL QUESTIONS MUST BE ANSWERED OR THIS AFFIDAVIT MAY BE REJECTED)

CLAIM NO: 69340 10160 I2G POLICY NO: 627540781

I. POLICYHOLDER

Name of Insured: Oralia Martinez
Address: 15154 Randall Ave.
City/ ST /Zip: Fontana, Ca. 92335
Phone # (HM) (909)829-3198 (WK) (909)829-3198 Other: None
Drivers Lic #/ ST: B8465170/CA DOB: 02/06/49

Occupation: Babysitter / Supervisor
Name & Address of Employer: Christian & Sonia Carrillo / 10829 Begonia St. Adelanto, Ca. 92301 / Esc. Domingo Marquez y Marquez - Toribio Ortega #6301 Col. Fco. Villa, Tijuana, B.C. Mexico
Length of Employment: 5 years / 09/2006
Salary range $: 1-25000 (X) 25001-40000 ( ) 40001-70000 ( ) +70k ( )

Spouse or Other: None
Address:
City/ ST /Zip:
Phone # (HM) ______ (WK) ______ Other ______
Drivers Lic #/ ST ______ DOB ______
Occupation:
Name & Address of Employer:
Length of Employment:
Salary range $: 1-25000 ( ) 25001-40000 ( ) 40001-70000 ( ) +70k ( )

Any Separations or Divorces (YES/(NO)) If yes, give both names, dates of marriage & divorce & county

Have you ever filed for bankruptcy? Yes ( ) No (X) If yes, date

II. LOSS FACTS

Date of Theft 10/20/06 Time 5:00 AM/(PM) Was Vehicle Locked? YES/(NO) Were keys in or on vehicle? YES/(NO)
Address where vehicle was taken from: Toribio Ortega #6301 Col. Fco. Villa, Tijuana, B.C. Mexico. Reason vehicle left there? I was working.
Name, Address & driver's license # of person leaving vehicle at this location: myself
If other, than the policyholder, did this person have permission to drive the vehicle? Yes/(No)
How did the person that last used the vehicle get home after the theft? with my husband
Name(s) & Address(es) of others who were present prior to the theft: None
Principal Use of Vehicle? personal Principal User? myself
Vehicle last parked? Date 10/20/06 Time 1:00 AM/(PM)
When was vehicle last seen? Date 10/20/06 Time 1:00 AM/(PM) By Whom? myself
When was the theft discovered? Date 10/20/06 Time 5:00 AM/(PM) By Whom? myself
When was the theft reported to the police? Date 10/20/06 Time 6:46 AM/(PM) By Whom? myself
Police Dept. Notified: Procuraduria General de Justicia del Estado de B.C. Report # 10050/06/211/AP How were police contacted? 911 / Non (Emergency #) Mexico 066
Was ignition locked? (Yes)/No Was car alarm on? (Yes)/No alarm Any other anti-theft devises in use? (Yes)/No Explain: Express Code / Express Standard Security System
How many sets of keys are there? 2 Are all sets in your possession? (YES) NO Who has other sets of keys? None
Has a copy of the key ever been made? Yes/(No) If yes, where N/A
Any other insurance on this vehicle? YES/(NO) If yes, (Name & Address of Company and Agent) N/A
Has vehicle been recovered? YES/(NO) Date __/__/__ Where? ______ Who recovered vehicle? ______
Condition of Vehicle ______ Present Location (Name, Address & Phone)
Who notified you of recovery? ______ Have any arrests been made? YES / NO
Do you suspect anyone? YES/(NO) Who (Name(s) & Address)
Do you have knowledge of the whereabouts of the vehicle? Yes/(No) Explain:
Have you ever experienced a vehicle theft before? Yes/(No) If yes, list date(s) & type of vehicle:
Have you or the user of your vehicle had a drivers license canceled, refused or suspended? Yes/(No) If yes, explain:
Are you currently renting a vehicle? Yes/No If yes, from whom?
List any personal contents in vehicle when stolen? See attached worksheet

III. VEHICLE INFORMATION

Year 2004 Make GMC Truck Model Envoy Edition ______ Body Type ______ Color Charcoal
Vehicle Identification # 1GKET16S446233737 License Plate # 5KHF036 State CA Year 2007
Vehicle mileage 43,000 Aprox. Titled (registered) Owner(s) Oralia Martinez
Date of Purchase 9/19/04 (NEW)/USED Purchase Price $ 41,796.00 At the time of purchase was the vehicle damaged? YES/(NO)
If YES describe damage ______ Was it repaired YES/ NO By whom? N/A
SELLER: Dealer / Individual (Name/ Address/ Phone) Ball Automotive Group.
How was vehicle paid for? CASH/ CHECK/ (FINANCED) If financed Name, Address, & Phone # of Company GMAC

Account # 611-90-55-99686 Is account past due? YES/(NO) If yes, how long?
Has the vehicle been offered for sale or trade within the last year? Yes/(No) Asking price: ______ How was it advertised?
Any offers? Yes/No If yes, how much? ______ If yes, from whom?

(Please turn over and complete the back of this form)

REV. 1/06/06

TRANSMISSION
Auto : OD Manual: 6spd 5spd 4spd 3spd

ENGINE SIZE: HP or CUBIC IN ______ # of Cylinders 3/ 4/ 6/ 8/ 10/ 12
Gas ( ) Diesel ( ) Turbo ( )

34

POWER OPTIONS	RAD[illegible]S	SEATS	ROOF	BUMPER[illegible]	OTHER
All Wheel Drive- 4X4	AM Radio	Power Seat	Vinyl Roof	Rear Step	Grill Guard
Power Steering	AM/FM Stereo	Dual Power	Carriage Roof	Tube Bumper	Fog Lights
Power Windows	AM/FM Tape	Heated Seats	Luggage Rack	Chrome Bumper	Winch
Power Locks	AM/FM Cass/CD	Split/ 60-40	Roll Bar/Lite Bar	Chrome Step Bumper	Canopy
Power Mirror(s)	CD/DVD/VCR Player	Bucket	Convertible Top	**WHEELS/TIRES**	CampShell
Heated Mirrors	CD Changer	Cloth/Velour	Hard Top	Wire Wheels	Bed Liner
Cruise Control	Equalizer	Leather Seats	**SUNROOF**	Wire Wheel Covers	Tool Box
Tilt Wheel	Amplifier	Vinyl Seats	Sliding Power	Alloy	ExtraTank
Rear Defogger	Speakers Box	Captain Chairs2	Sliding Manual	Chromed Alloy	Lift Kit
Air Conditioning	TV-Multi-Media		T-Top Glass	Styled Steel	Dash Mat
Dual Air Conditioner	Navigation System	**Paint/Trim/Glass**	T-Top Solid	Manual Lock	Ground Effects
Anti-Lock Brakes	Alarm	Two Tone	**TRUCKS/VANS**	Auto Lock Hubs	Rear Spoiler
Air Bag	Lojack / On-Star	Graphics	Refrigerator		SlideRWindow
Passenger Air Bag	Keyless Entry	Privacy Glass	Microwave	Trailer Tow Pkg.	RunBoards
Air Bag Other:	Phone	Tinted Glass	TV (B&W)(CLR)	Dual Rear Wheels	Exterior visor
Power Antenna	CB Radio		Full Pop-Top	Camper Special	BRA
Rear Window Wiper	Overhead Consol		½ Pop-Top	Trailer Hitch	Air Dam
Power Trunk Release	Light Entry System				

Performance Equipment, List : ______

TRUCKS/VANS

Short Bed Long Bed TRUCK: Regular Cab/Ext Cab/Crew Cab Flatside/Stepside/Fleetside Van:Cargo/Passenger/Regular/Extended/Conv
Camper Top 1) Fiberglass 2) Aluminum Brand: ______ Age: ______ Cost $ ______
Package: (i.e. XLT Scottsdale, Silverado, Mark III Vans etc.) ______

REFURBISHMENT (rebuilt, replaced, repainted or major repairs)

	Mileage at time of work	Cost	Who performed work?	Date	
Transmission					Receipt Attached Y/N
Engine					Receipt Attached Y/N
Wheels and Tires					Receipt Attached Y/N
Paint					Receipt Attached Y/N
Interior					Receipt Attached Y/N
Stereo					Receipt Attached Y/N

Vehicle Condition Prior to Theft: Upholstery/Interior: [ ] worn [ ] tears [ ] seams split [ ] dash cracked [ ] None of the listed
Exterior/Body: [ ] Door dings/scratches [ ] dents, location: ______ rust [ ] location: ______ [ ] None the listed
Paint : [ ] Faded [ ] Oxidized [ ] Peeling [ ]Primered [ ] None of the listed

VEHICLE CONDITION: (circle one)POOR FAIR GOOD (EXCELLENT)
Who performed regular maintenance? (Name, Address, Phone) Ball Automotive Group / 1935 National City Blvd. National City Ca. 91950
Date last serviced 10/2006 What was done? Oil change
Any electrical/mechanical problems prior to the theft? Yes/(No) Explain: ______
Who performed the last SMOG inspection? (CA) None Address ______
Have there been other repairs done not listed above? Yes/(No) If yes, provide Name, Address, Phone: ______
Does your title or registration state "Salvage" on it? Yes/(No)
To the best of your knowledge has this vehicle ever been declared a salvage vehicle? Yes/(No)
Have you ever applied for duplicate title on this vehicle? Yes/(No)
Has this vehicle ever been involved in any type of accident, vandalism or theft before this loss? Yes/(No) If yes, attach repair receipts if available and describe damage in full: ______
Has this vehicle ever been involved in an organized or spontaneous racing or speed event? Yes/(No)

IV. POLICY INFORMATION

Present Agent Candy Raya How long insured with Allstate? 9/19/2004
Prior Insurance Co., Agent & Policy #(s) None
Have you ever been canceled, terminated or non-renewed by a prior insurance company? YES / NO If Yes, explain N/A

Any other vehicle(s) in household? (YES)/ NO If yes, Year, Make & Model Jeep Cheroke 1995 / Dodge Omni 1982
Has other vehicle been damaged in past 3 years? YES /(NO) If yes, describe damage ______
Were repairs completed? YES / NO If yes, by whom (Name & Address) N/A
Name & address of Insurance Company which paid for the damages? N/A

V. FOR YOUR PROTECTION, CALIFORNIA LAW REQUIRES THE FOLLOWING TO APPEAR ON THIS FORM: Any person who knowingly presents a false or fraudulent claim for the payment of a loss is guilty of a crime and may be subject to fines and confinement in state prison (California Insurance Code: 1879.2).

In accordance with California Insurance Code: 1871.3(a)(1): False representations made on the signed claim form by the insured subject the insured to a penalty of perjury.

Allstate Policy Provision: "Fraud – This policy will not apply to any claim in which an insured person has concealed or misrepresented any material fact or circumstance."

Print Name of Insured person completing the affidavit: Oralia Martinez

Signature must be witnessed by an Allstate Agent, Allstate Claim Adjuster or a Notary Public.

Signature of Insured person completing affidavit: [signature] Date 10/27/2006

If Agent/Claim Adjuster is witnessing signature, the Agent/Claims Adjuster must identify the person signing this affidavit by his/her drivers license # ______

Print Name of Agent and Agent # or Claim Adjuster's Name ______

Signature of Agent/Claim Adjuster ______ Date: ______

If Notary certifying signature, attach notary public certificate.

Subscribed & Sworn to before me, this 27th day of October 20 06

[signature]
Notary Public

My Commission Expires: 07/19 20 09

35

PLEASE RETURN WITH AFFIDAVIT

✓ All questions on Affidavit answered.

✓ Affidavit signed and signature notarized or witnessed by Allstate Agent.

____ Photograph of vehicle enclosed (if available).

N/A Original receipts for optional items on vehicle enclosed (such as: stereo, wheels, etc.) Photocopies are not acceptable.

✓ Bill of Sale or Sales Contract.

N/A Clothing/luggage data completed if claim being made.

Phone number where you can be reached during the day:

1) Name Oralia Martinez (909) 829-3198

2) Name ________ ( ) ________

3) Name ________ ( ) ________

4) Name ________ FAX( ) ________

Your auto policy allows for limited ***CLOTHING AND LUGGAGE*** items only (attach original receipts if available).

Description of Item	Date Purchased	Place Purchased	Purchase Price
N/A			

34

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of San Bernardino } ss.

On October 27, 2006 (Date) before me, Maria L. Rodriguez (Name and Title of Officer (e.g., "Jane Doe, Notary Public")),
personally appeared Oralia Martinez (Name(s) of Signer(s)),

~~☐ personally known to me~~
☒ proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

MARIA L. RODRIGUEZ
Commission # 1591784
Notary Public - California
San Bernardino County
My Comm. Expires Jul 19, 2009

WITNESS my hand and official seal.

[signature]
Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Affidavit of Vehicle Theft

Document Date: 10/27/06 Number of Pages: 1

Signer(s) Other Than Named Above: Ø

Capacity(ies) Claimed by Signer

Signer's Name: Oralia Martinez

☒ Individual
☐ Corporate Officer — Title(s): ______
☐ Partner — ☐ Limited ☐ General
☐ Attorney-in-Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: ______

Signer Is Representing: ______

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

© 1999 National Notary Association • 9350 De Soto Ave., P.O. Box 2402 • Chatsworth, CA 91313-2402 • www.NationalNotary.org Prod. No. 5907 Reorder: Call Toll-Free 1-800-876-6827

31

CT CORPORATION
A WoltersKluwer Company

Service of Process Transmittal
05/27/2008
CT Log Number 513464614

TO: Scott McFarland
Allstate Insurance Company
Diamond Bar MCO, 21950 E. Copley Dr., 1st Flr.
Diamond Bar, CA 91765-

RE: **Process Served in California**

FOR: ALLSTATE INDEMNITY COMPANY (Domestic State: IL)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION:	Oralia Martinez, Pltf. vs. Allstate Indemnity Company, et al., Dfts.
DOCUMENT(S) SERVED:	Summons, Notice, Complaint, Exhibit(s);
COURT/AGENCY:	San Diego County, Chula Vista, Superior Court, CA Case # 37200800069884CUICSC
NATURE OF ACTION:	Insurance Litigation - Breach of Contract - Failure to Failure to perform their obligations under the policy
ON WHOM PROCESS WAS SERVED:	C T Corporation System, Los Angeles, CA
DATE AND HOUR OF SERVICE:	By Process Server on 05/27/2008 at 08:20
APPEARANCE OR ANSWER DUE:	Within 30 days after service
ATTORNEY(S) / SENDER(S):	J. Manuel Sanchez J. Manuel Sanchez & Associates 482 W. San Ysidro Blvd. Suite 3 San Ysidro, CA 92173 619 662 2080
ACTION ITEMS:	SOP Papers with Transmittal, via Fed Ex Priority Overnight , 798448936054 Email Notification, Patti Gariti pgarq@allstate.com
SIGNED:	C T Corporation System
PER:	Nancy Flores
ADDRESS:	818 West Seventh Street Los Angeles, CA 90017
TELEPHONE:	213-337-4615

Page 1 of 1 / WM

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 500 Third Avenue MAILING ADDRESS: 500 Third Avenue CITY AND ZIP CODE: Chula Vista, CA 91910-5649 BRANCH NAME: South County TELEPHONE NUMBER: (619) 691-4400	
PLAINTIFF(S) / PETITIONER(S): Oralia Martinez	
DEFENDANT(S) / RESPONDENT(S): Allstate Indemnity Company	
MARTINEZ VS. ALLSTATE INDEMNITY COMPANY	
NOTICE OF CASE ASSIGNMENT	CASE NUMBER: 37-2008-00069884-CU-IC-SC

Judge: William S. Cannon Department: S-04

COMPLAINT/PETITION FILED: 04/11/2008

CASES ASSIGNED TO THE PROBATE DIVISION ARE NOT REQUIRED TO COMPLY WITH THE CIVIL REQUIREMENTS LISTED BELOW

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT).

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION II, AND WILL BE STRICTLY ENFORCED.

TIME STANDARDS: The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil consists of all cases except: Small claims appeals, petitions, and unlawful detainers.

COMPLAINTS: Complaints must be served on all named defendants, and a CERTIFICATE OF SERVICE (SDSC CIV-345) filed within 60 days of filing. This is a mandatory document and may not be substituted by the filing of any other document.

DEFENDANT'S APPEARANCE: Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than a 15 day extension which must be in writing and filed with the Court.)

DEFAULT: If the defendant has not generally appeared and no extension has been granted, the plaintiff must request default within 45 days of the filing of the Certificate of Service.

THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO LITIGATION, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. MEDIATION SERVICES ARE AVAILABLE UNDER THE DISPUTE RESOLUTION PROGRAMS ACT AND OTHER PROVIDERS. SEE ADR INFORMATION PACKET AND STIPULATION.

YOU MAY ALSO BE ORDERED TO PARTICIPATE IN ARBITRATION PURSUANT TO CCP 1141.10 AT THE CASE MANAGEMENT CONFERENCE. THE FEE FOR THESE SERVICES WILL BE PAID BY THE COURT IF ALL PARTIES HAVE APPEARED IN THE CASE AND THE COURT ORDERS THE CASE TO ARBITRATION PURSUANT TO CCP 1141.10. THE CASE MANAGEMENT CONFERENCE WILL BE CANCELLED IF YOU FILE FORM SDSC CIV-359 PRIOR TO THAT HEARING

5/27/08 8:06

SUMMONS
(CITACION JUDICIAL)

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED
SOUTH COUNTY
2008 APR 11 PM 2:10
CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
ALLSTATE INDEMNITY COMPANY, DOES 1 through 50, inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
ORALIA MARTINEZ

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.
There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una Carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la Corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia. Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):

CASE NUMBER: *(Número del Caso):* 37-2008-00069884-CU-IC-SC

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
- ☐ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827
- ☐ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081-6643
- ☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941
- ☐ RAMONA BRANCH 1428 MONTECITO RD., RAMONA CA 92065-5200
- ☒ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649
- ☐ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

J. MANUEL SANCHEZ, ESQ. (619) 662-2080
J. MANUEL SANCHEZ & ASSOCIATES
482 W. San Ysidro Blvd., Suite 3
San Ysidro, CA 92173

DATE: *(Fecha)* APR 11 2008

CLERK OF THE SUPERIOR COURT
Clerk, by *(Secretario)* R. DIAZ, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons (form POS-010))
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify)*:
3. ☒ on behalf of *(specify)*: Allstate Indemnity Company

under
- ☒ CCP 416.10 (corporation)
- ☐ CCP 416.20 (defunct corporation)
- ☐ CCP 416.40 (association or partnership)
- ☐ other *(specify)*:
- ☐ CCP 416.60 (minor)
- ☐ CCP 416.70 (conservatee)
- ☐ CCP 416.90 (individual)

4. ☒ by personal delivery on *(date)*:

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 500 Third Avenue MAILING ADDRESS: 500 Third Avenue CITY AND ZIP CODE: Chula Vista, CA 91910-5649 BRANCH NAME: South County TELEPHONE NUMBER: (619) 691-4400	
PLAINTIFF(S) / PETITIONER(S): Oralia Martinez	
DEFENDANT(S) / RESPONDENT(S): Allstate Indemnity Company	
MARTINEZ VS. ALLSTATE INDEMNITY COMPANY	
NOTICE OF CASE ASSIGNMENT	CASE NUMBER: 37-2008-00069884-CU-IC-SC

Judge: William S. Cannon

Department: S-04

COMPLAINT/PETITION FILED: 04/11/2008

CASES ASSIGNED TO THE PROBATE DIVISION ARE NOT REQUIRED TO COMPLY WITH THE CIVIL REQUIREMENTS LISTED BELOW

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT).

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION II, AND WILL BE STRICTLY ENFORCED.

TIME STANDARDS: The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil consists of all cases except: Small claims appeals, petitions, and unlawful detainers.

COMPLAINTS: Complaints must be served on all named defendants, and a CERTIFICATE OF SERVICE (SDSC CIV-345) filed within 60 days of filing. This is a mandatory document and may not be substituted by the filing of any other document.

DEFENDANT'S APPEARANCE: Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than a 15 day extension which must be in writing and filed with the Court.)

DEFAULT: If the defendant has not generally appeared and no extension has been granted, the plaintiff must request default within 45 days of the filing of the Certificate of Service.

THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO LITIGATION, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. MEDIATION SERVICES ARE AVAILABLE UNDER THE DISPUTE RESOLUTION PROGRAMS ACT AND OTHER PROVIDERS. SEE ADR INFORMATION PACKET AND STIPULATION.

YOU MAY ALSO BE ORDERED TO PARTICIPATE IN ARBITRATION PURSUANT TO CCP 1141.10 AT THE CASE MANAGEMENT CONFERENCE. THE FEE FOR THESE SERVICES WILL BE PAID BY THE COURT IF ALL PARTIES HAVE APPEARED IN THE CASE AND THE COURT ORDERS THE CASE TO ARBITRATION PURSUANT TO CCP 1141.10. THE CASE MANAGEMENT CONFERENCE WILL BE CANCELLED IF YOU FILE FORM SDSC CIV-359 PRIOR TO THAT HEARING

Date 4/24/08

NEW ECL ASSIGNMENT WORKSHEET

Suit Name: Martinez v. Allstate

Claim Number: 6934870160

MCO: SIU

Date of Loss: 10/20/06

Type of Loss: ____________________

Insured (if different from above): ____________________

Removal? ____________________

Assigned to: Allyson

Attorney Assigned to: Peter Klee

Date Assigned: 4/24/08

Mary:

______ Fax copy to ____________________

______ Mail copy to ____________________

______ Fax copy to assigned attorney

______ Mail original to assigned attorney

CT CORPORATION
A WoltersKluwer Company

Service of Process Transmittal
04/23/2008
CT Log Number 513349679

TO: Scott McFarland
Allstate Insurance Company
Diamond Bar MCO, 21950 E. Copley Dr., 1st Flr.
Diamond Bar, CA 91765-

RE: **Process Served in California**

FOR: ALLSTATE INDEMNITY COMPANY (Domestic State: IL)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION:	Oralia Martinez, Pltf. vs. Allstate Indemnity Company, et al., Dfts.
DOCUMENT(S) SERVED:	Letter, Self Addressed Envelope, Notice and Acknowledgment of Receipt(s), Notice, Summons, Complaint, Index, Exhibit(s), Proof of Service of Summons
COURT/AGENCY:	Superior Court, County of San Diego, CA Case # 37200800069884
NATURE OF ACTION:	Insurance Litigation - Breach of Contract - Failure to conduct a full and complete investigation of the claim, and refused to pay the benefits owing under the policy
ON WHOM PROCESS WAS SERVED:	C T Corporation System, Los Angeles, CA
DATE AND HOUR OF SERVICE:	By Certified Mail on 04/23/2008 postmarked on 04/22/2008
APPEARANCE OR ANSWER DUE:	Within 30 days after service
ATTORNEY(S) / SENDER(S):	J. Manuel Sanchez J. Manuel Sanchez & Associates Attorney At Law 482 W. San Yaldro Boulevard Suite 3 San Ysidro, CA 92173 619-662-2080
ACTION ITEMS:	SOP Papers with Transmittal, via Fed Ex Priority Overnight , 790498960247 Email Notification, Patti Gariti pgarq@allstate.com
SIGNED: **PER:** **ADDRESS:** **TELEPHONE:**	C T Corporation System Nancy Flores 818 West Seventh Street Los Angeles, CA 90017 213-337-4615

Page 1 of 1 / BF

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

Superior Court of California, County of San Diego

Court Index Home Previous Page New Case Number Search Print

View Case Detail

Case Title:	ORALIA MARTINEZ VS. ALLSTATE INDEMNITY COMPANY		
Case Number:	37-2008-00069884-CU-IC-SC	Case Location:	South County
Case Type:	Civil	Date Filed:	04/11/2008
Category:	CU-IC		Insurance Coverage

File Location

Plaintiff/Petitioner		
Last Name or Business Name	First Name	Primary (P)
MARTINEZ	ORALIA	P

Defendant/Respondent		
Last Name or Business Name	First Name	Primary (P)
ALLSTATE INDEMNITY COMPANY		P

Microfilm			
Microfilm ID	Location	Reel Number	Frame Number
This case has not been microfilmed.			

Superior Court of California, County of San Diego

Court Information | General Information | Online Services | Thursday, April 24 | Search

SDCourt Home: General Information: Court Locations: South County

South County Regional Center

The South County Regional Center is a facility occupied by the Superior Court, Sheriff, Probation, District Attorney, Revenue and Recovery, and the Board of Supervisors.This branch hears Criminal, Civil, Family Law, and Juvenile Dependency cases.

Phone Numbers

- (619) 691-4775 : Accounting
- (619) 691-4770 : Administration
- (619) 691-4726 : Criminal/Traffic/Minor Offense Filing/Records
- (619) 691-4439 : Civil, Small Claims Filing/Records
- (619) 236-2681 : Family Court Services
- (619) 531-3234 : Family Law Facilitator *(Recorded Information)*
- (619) 691-4875 : Family Law Filing/Records
- (619) 691-4678 : Juvenile Dependency

For specific department calendar telephone numbers, see the list of current departments.

Directions

The South County Regional Center is located at:

500 3rd Avenue
Chula Vista, California 91910

From I-805 (either direction)

Take the H STREET WEST exit.

Merge onto H ST.

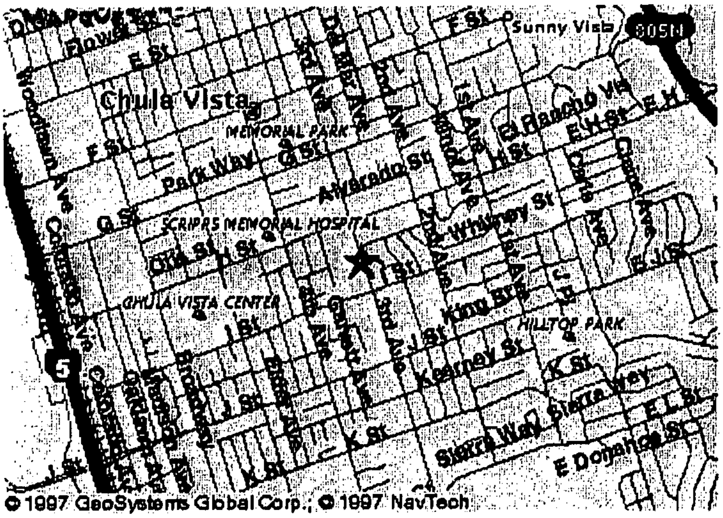
Left on 3rd Ave.

From I-5 (either direction)

Take the H STREET EAST exit.

Merge onto H ST.

Right on 3rd Ave.


Chula Vista
Sunny Vista
805
5
E St
F St
G St
H St
I St
J St
K St
Park Way
Alvarado St
Whitney St
King St
Kearney St
Sierra Way
E Donahoe St
MEMORIAL PARK
SCRIPPS MEMORIAL HOSPITAL
CHULA VISTA CENTER
HILLTOP PARK

© 1997 GeoSystems Global Corp.; © 1997 NavTech

Parking

Public parking lots around the courthouse are highlighted in yellow.

Metered parking is also available on the streets surrounding the courthouse.

2008 Court Information Technology
Superior Court of California, County of San Diego

Previous page

| Hall_of_Justice | | Main_Courthouse | | Family | | Madge_Bradley | | Juvenile | | Kearny_Mesa_Facility | | North_County | | East_County | | Ramona | | South_County |

South County	Dept. 16	ESTEBAN HERNANDEZ, Judge	**Supervising, South Bay Court**
South County	Dept. 1	GARY S. BLOCH, Commissioner	
South County	Dept. 2		*TRAFFIC, UNLAWFUL DETAINERS, SMALL CLAIMS*
South County	Dept. 3	DAVID M. RUBIN, Judge	
South County	Dept. 4	WILLIAM S. CANNON, Judge	
South County	Dept. 5	CAROL MUEHLING FRAUSTO, Commissioner	
South County	Dept. 6	TIMOTHY B. TAYLOR, Judge	
South County	Dept. 7	SUSAN P. FINLAY, Judge	
South County	Dept. 8	WILLIAM H MCADAM, Judge	
South County	Dept. 9		*(available for assignment)*
South County	Dept. 10	LAURA J. BIRKMEYER, Judge	
South County	Dept. 11		*JUVENILE DEPENDENCY*
South County	Dept. 12		*(available for assignment)*
South County	Dept. 14	ALVIN E. GREEN, JR., Judge	
South County	Dept. 15	TIMOTHY R. WALSH, Judge	

Extracted from San Diego Superior Court case management data 01:10AM 24 APR 2008

POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, Sta*[illegible]*r, and address)*: J. Manuel Sanchez, Esq 74994 J. MANUEL SANCHEZ & ASSOCIATES 482 W San Ysidro Blvd., Suite 3 San Ysidro, CA 92173 TELEPHONE NO.: (619) 662-2080 FAX NO. *(Optional)*: (619) 662-2048 E-MAIL ADDRESS *(Optional)*: mannylaw@sbcglobal.net ATTORNEY FOR *(Name)*: Plaintiff Oralia Martinez	*FOR COURT USE ONLY* COPY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 500 Third Ave. MAILING ADDRESS: Same CITY AND ZIP CODE: Chula Vista, CA 91910 BRANCH NAME: SOUTH COUNTY REGIONAL CENTER	
PLAINTIFF/PETITIONER: ORALIA MARTINEZ DEFENDANT/RESPONDENT: ALLSTATE INDEMNITY COMPANY	
NOTICE AND ACKNOWLEDGMENT OF RECEIPT - CIVIL	CASE NUMBER: 37-2008-00069884-CU-IC-SC

TO *(insert name of party being served)*: ALLSTATE INDEMNITY COMPANY

NOTICE

The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing: 4/21/08

CHRISTIAN CRUZ
(TYPE OR PRINT NAME)

▶ (SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of ***(to be completed by sender before mailing)***:

1. [X] A copy of the summons and of the complaint.
2. [X] Other *(specify)*:
   NOTICE OF CASE ASSIGNMENT

(To be completed by recipient):

Date this form is signed:

(TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY, ON WHOSE BEHALF THIS FORM IS SIGNED)

▶ (SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

POS-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
J. Manuel Sanchez, Esq 74994
J. MANUEL SANCHEZ & ASSOCIATES
482 W San Ysidro Blvd., Suite 3
San Ysidro, CA 92173
TELEPHONE NO.: (619) 662-2080 FAX NO. (Optional): (619) 662-2048
E-MAIL ADDRESS (Optional): mannylaw@sbcglobal.net
ATTORNEY FOR (Name): Plaintiff Oralia Martinez

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
STREET ADDRESS: 500 Third Ave.
MAILING ADDRESS: Same
CITY AND ZIP CODE: Chula Vista, CA 91910
BRANCH NAME: SOUTH COUNTY REGIONAL CENTER

PLAINTIFF/PETITIONER: ORALIA MARTINEZ

DEFENDANT/RESPONDENT: ALLSTATE INDEMNITY COMPANY

CASE NUMBER: 37-2008-00069884-CU-IC-SC

PROOF OF SERVICE OF SUMMONS

Ref. No. or File No.:

(Separate proof of service is required for each party served.)

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of:
   a. [X] summons
   b. [X] complaint
   c. [ ] Alternative Dispute Resolution (ADR) package
   d. [ ] Civil Case Cover Sheet *(served in complex cases only)*
   e. [ ] cross-complaint
   f. [X] other *(specify documents)*: NOTICE OF CASE ASSIGNMENT
3. a. Party served *(specify name of party as shown on documents served)*:

   b. [X] Person (other than the party in item 3a) served on behalf of an entity or as an authorized agent (and not a person under item 5b on whom substituted service was made) *(specify name and relationship to the party named in item 3a)*:
   CT CORPORATION SYSTEM (Agent for Service of Process)
4. Address where the party was served:
   818 West Seventh St.
   Los Angeles, CA 90017
5. I served the party *(check proper box)*
   a. [ ] **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on *(date)*: (2) at *(time)*:
   b. [ ] **by substituted service.** On *(date)*: at *(time)*: I left the documents listed in item 2 with or in the presence of *(name and title or relationship to person indicated in item 3)*:

      (1) [ ] **(business)** a person at least 18 years of age apparently in charge at the office or usual place of business of the person to be served. I informed him or her of the general nature of the papers.
      (2) [ ] **(home)** a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party. I informed him or her of the general nature of the papers.
      (3) [ ] **(physical address unknown)** a person at least 18 years of age apparently in charge at the usual mailing address of the person to be served, other than a United States Postal Service post office box. I informed him or her of the general nature of the papers.
      (4) [ ] I thereafter mailed (by first-class, postage prepaid) copies of the documents to the person to be served at the place where the copies were left (Code Civ. Proc., § 415.20). I mailed the documents on *(date)*: from *(city)*: or [ ] a declaration of mailing is attached.
      (5) [ ] I attach a **declaration of diligence** stating actions taken first to attempt personal service.

ORALIA MARTINEZ

PLAINTIFF/PETITIONER: ORALIA MARTINEZ DEFENDANT/RESPONDENT: ALLSTATE INDEMNITY CO.	CASE NUMBER: 37-2008-00069884

5. c. [X] **by mail and acknowledgment of receipt of service.** I mailed the documents listed in item 2 to the party, to the address shown in item 4, by first-class mail, postage prepaid,
   (1) on *(date)*: 4/21/08 (2) from *(city)*: San Ysidro, CA
   (3) [X] with two copies of the *Notice and Acknowledgment of Receipt* and a postage-paid return envelope addressed to me. *(Attach completed* Notice and Acknowledgment of Receipt.) (Code Civ. Proc., § 415.30.)
   (4) [ ] to an address outside California with return receipt requested. (Code Civ. Proc., § 415.40.)
   d. [ ] by other means *(specify means of service and authorizing code section)*:

   [ ] Additional page describing service is attached.

6. The "Notice to the Person Served" (on the summons) was completed as follows:
   a. [ ] as an individual defendant.
   b. [ ] as the person sued under the fictitious name of *(specify)*:
   c. [ ] as occupant.
   d. [ ] On behalf of *(specify)*:
   under the following Code of Civil Procedure section:
   - [X] 416.10 (corporation)
   - [ ] 416.20 (defunct corporation)
   - [ ] 416.30 (joint stock company/association)
   - [ ] 416.40 (association or partnership)
   - [ ] 416.50 (public entity)
   - [ ] 415.95 (business organization, form unknown)
   - [ ] 416.60 (minor)
   - [ ] 416.70 (ward or conservatee)
   - [ ] 416.90 (authorized person)
   - [ ] 415.46 (occupant)
   - [ ] other:

7. **Person who served papers**
   a. Name: Christian Cruz
   b. Address: 482 W San Ysidro Blvd., Ste 3, San Ysidro, CA 92173
   c. Telephone number: (619)662-2080
   d. The fee for service was: $ 0.00
   e. I am:
   (1) [X] not a registered California process server.
   (2) [ ] exempt from registration under Business and Professions Code section 22350(b).
   (3) [ ] registered California process server:
   (i) [ ] owner [ ] employee [ ] independent contractor.
   (ii) Registration No.:
   (iii) County:

8. [X] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
   or

9. [ ] I am a California sheriff or marshal and I certify that the foregoing is true and correct.

Date: 4/21/08

CHRISTIAN CRUZ
(NAME OF PERSON WHO SERVED PAPERS/SHERIFF OR MARSHAL)

▶ Christian Cruz
(SIGNATURE)

CT CORPORATION
A WoltersKluwer Company

Service of Process Transmittal
04/23/2008
CT Log Number 513349679

TO: Scott McFarland
Allstate Insurance Company
Diamond Bar MCO, 21950 E. Copley Dr., 1st Flr.
Diamond Bar, CA 91765-

RE: **Process Served in California**

FOR: ALLSTATE INDEMNITY COMPANY (Domestic State: IL)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION:	Oralia Martinez, Pltf. vs. Allstate Indemnity Company, et al., Dfts.
DOCUMENT(S) SERVED:	Letter, Self Addressed Envelope, Notice and Acknowledgment of Receipt(s), Notice, Summons, Complaint, Index, Exhibit(s), Proof of Service of Summons
COURT/AGENCY:	Superior Court, County of San Diego, CA Case # 37200800069884
NATURE OF ACTION:	Insurance Litigation - Breach of Contract - Failure to conduct a full and complete investigation of the claim, and refused to pay the benefits owing under the policy
ON WHOM PROCESS WAS SERVED:	C T Corporation System, Los Angeles, CA
DATE AND HOUR OF SERVICE:	By Certified Mail on 04/23/2008 postmarked on 04/22/2008
APPEARANCE OR ANSWER DUE:	Within 30 days after service
ATTORNEY(S) / SENDER(S):	J. Manuel Sanchez J. Manuel Sanchez & Associates Attorney At Law 482 W. San Ysidro Boulevard Suite 3 San Ysidro, CA 92173 619-662-2080
ACTION ITEMS:	SOP Papers with Transmittal, via Fed Ex Priority Overnight , 790498960247 Email Notification, Patti Gariti pgarq@allstate.com
SIGNED:	C T Corporation System
PER:	Nancy Flores
ADDRESS:	818 West Seventh Street Los Angeles, CA 90017
TELEPHONE:	213-337-4615

Page 1 of 1 / BF

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

J. MANUEL SANCHEZ & ASSOCIATES
Attorneys at Law
482 West San Ysidro Blvd., Suite 3
San Ysidro, CA 92173

POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State [illegible] r, and address)*:	FOR COURT USE ONLY
J. Manuel Sanchez, Esq 74994 J. MANUEL SANCHEZ & ASSOCIATES 482 W San Ysidro Blvd., Suite 3 San Ysidro, CA 92173 TELEPHONE NO.: (619) 662-2080 FAX NO. *(Optional)*: (619) 662-2048 E-MAIL ADDRESS *(Optional)*: mannylaw@sbcglobal.net ATTORNEY FOR *(Name)*: Plaintiff Oralia Martinez	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 500 Third Ave. MAILING ADDRESS: Same CITY AND ZIP CODE: Chula Vista, CA 91910 BRANCH NAME: SOUTH COUNTY REGIONAL CENTER	
PLAINTIFF/PETITIONER: ORALIA MARTINEZ DEFENDANT/RESPONDENT: ALLSTATE INDEMNITY COMPANY	
NOTICE AND ACKNOWLEDGMENT OF RECEIPT - CIVIL	CASE NUMBER: 37-2008-00069884-CU-IC-SC

TO *(insert name of party being served)*: ALLSTATE INDEMNITY COMPANY

NOTICE

The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing: 4/21/08

CHRISTIAN CRUZ
(TYPE OR PRINT NAME)

(SIGNATURE OF SENDER-MUST NOT BE A PARTY IN THIS CASE)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of ***(to be completed by sender before mailing)***:

1. [X] A copy of the summons and of the complaint.
2. [X] Other *(specify)*:
   NOTICE OF CASE ASSIGNMENT

(To be completed by recipient):

Date this form is signed:

(TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY, ON WHOSE BEHALF THIS FORM IS SIGNED)

(SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

Form Adopted for Mandatory Use
Judicial Council of California
POS-015 [Rev. January 1, 2005]
Martin Dean's Essential Forms TM

NOTICE AND ACKNOWLEDGMENT OF RECEIPT - CIVIL

Code of Civil Procedure, §§ 415.30, 417.10
www.courtinfo.ca.gov

ORALIA MARTINEZ

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
STREET ADDRESS: 500 Third Avenue
MAILING ADDRESS: 500 Third Avenue
CITY AND ZIP CODE: Chula Vista, CA 91910-5649
BRANCH NAME: South County
TELEPHONE NUMBER: (619) 691-4400

PLAINTIFF(S) / PETITIONER(S): Oralia Martinez

DEFENDANT(S) / RESPONDENT(S): Allstate Indemnity Company

MARTINEZ VS. ALLSTATE INDEMNITY COMPANY

NOTICE OF CASE ASSIGNMENT	CASE NUMBER: 37-2008-00069884-CU-IC-SC

Judge: William S. Cannon Department: S-04

COMPLAINT/PETITION FILED: 04/11/2008

CASES ASSIGNED TO THE PROBATE DIVISION ARE NOT REQUIRED TO COMPLY WITH THE CIVIL REQUIREMENTS LISTED BELOW

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT).

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION II, AND WILL BE STRICTLY ENFORCED.

TIME STANDARDS: The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil consists of all cases except: Small claims appeals, petitions, and unlawful detainers.

COMPLAINTS: Complaints must be served on all named defendants, and a CERTIFICATE OF SERVICE (SDSC CIV-345) filed within 60 days of filing. This is a mandatory document and may not be substituted by the filing of any other document.

DEFENDANT'S APPEARANCE: Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than a 15 day extension which must be in writing and filed with the Court.)

DEFAULT: If the defendant has not generally appeared and no extension has been granted, the plaintiff must request default within 45 days of the filing of the Certificate of Service.

THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO LITIGATION, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. MEDIATION SERVICES ARE AVAILABLE UNDER THE DISPUTE RESOLUTION PROGRAMS ACT AND OTHER PROVIDERS. SEE ADR INFORMATION PACKET AND STIPULATION.

YOU MAY ALSO BE ORDERED TO PARTICIPATE IN ARBITRATION PURSUANT TO CCP 1141.10 AT THE CASE MANAGEMENT CONFERENCE. THE FEE FOR THESE SERVICES WILL BE PAID BY THE COURT IF ALL PARTIES HAVE APPEARED IN THE CASE AND THE COURT ORDERS THE CASE TO ARBITRATION PURSUANT TO CCP 1141.10. THE CASE MANAGEMENT CONFERENCE WILL BE CANCELLED IF YOU FILE FORM SDSC CIV-359 PRIOR TO THAT HEARING

SUMMONS
(CITACION JUDICIAL)

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
ALLSTATE INDEMNITY COMPANY, DOES 1 through 50, inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
ORALIA MARTINEZ

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.
There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una Carta o una llamada telefóinica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la Corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia. Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CASE NUMBER: *(Número del Caso):* 37-2008-00069884-CU-IC-SC

- ☐ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827
- ☐ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081-6643
- ☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941
- ☐ RAMONA BRANCH 1428 MONTECITO RD., RAMONA CA 92065-5200
- ☒ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649
- ☐ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

J. MANUEL SANCHEZ, ESQ. (619) 662-2080
J. MANUEL SANCHEZ & ASSOCIATES
482 W. San Ysidro Blvd., Suite 3
San Ysidro, CA 92173

DATE: *(Fecha)* APR 1 1 2008

CLERK OF THE SUPERIOR COURT
Clerk, by *(Secretario)* R. DIAZ, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons (form POS-010))
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify)*:
3. ☐ on behalf of *(specify)*:

under ☒ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416 90 (individual)
☐ other *(specify)*:

4. ☐ by personal delivery on *(date)*:

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 [Rev. January 1, 2004]
SDSC CIV-219(Rev. 1-04)

SUMMONS

Code of Civil Procedure §§ 412.20, 465

American LegalNet, Inc.
www.USCourtForms.com

CERTIFIED MAIL™

7007 2560 0001 6799 2418

J Manuel Sanchez & Associates
Attorneys at Law
482 W. San Ysidro Blvd. Suite 3
San Ysidro, California 92173

CT Corporation System
RE: ALLSTATE INDEMNITY CO.
818 West Seventh St.
Los Angeles, CA 90017

Peter H. Klee, State Bar No. 111707
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

Attorneys for Defendant Allstate Indemnity Company

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

ORALIA MARTINEZ, Plaintiff, v. ALLSTATE INDEMNITY COMPANY, Defendant.	Case No. 37-2008-00069884-CU-IC-CTL **DEFENDANT ALLSTATE INDEMNITY COMPANY'S ANSWER TO PLAINTIFF'S COMPLAINT** Judge: Ronald S. Prager Dept.: SD-71 Comp. Filed: April 11, 2008

Defendant Allstate Indemnity Company ("Allstate") hereby answers to plaintiff's unverified Complaint for Damages ("Complaint") and alleges as follows:

GENERAL DENIAL

Answering the Complaint herein, and each and every cause of action contained therein, Allstate denies generally and specifically, conjunctively and disjunctively, each and every, all and singularly, of the allegations of the Complaint and each and every cause of action therein pursuant to the provisions of section 431.30 of the California Code of Civil Procedure.

Without admitting that it holds the burden of proof, Allstate alleges the following separate and additional defenses:

FIRST SEPARATE AND ADDITIONAL DEFENSE

(Failure to State a Claim Upon Which Relief Can Be Granted)

The Complaint, and each and every purported cause of action therein, fails to state facts sufficient to constitute a cause of action or to state a claim upon which relief can be granted.

SECOND SEPARATE AND ADDITIONAL DEFENSE

(Recovery Precluded by Contract)

Allstate alleges that Plaintiff's right to recovery is limited to the specific terms and conditions set forth in the Policy, that such terms and conditions could not be modified or amended except in writing and in accordance with the Policy's terms, and that, under the terms of the Policy, Plaintiff is precluded from relief.

THIRD SEPARATE AND ADDITIONAL DEFENSE

(Failure to Comply with Contract Terms)

The Complaint, and each purported cause of action, is barred because Plaintiff has not fully complied with all the terms and conditions of the Policy necessary for recovery.

FOURTH SEPARATE AND ADDITIONAL DEFENSE

(Waiver)

Plaintiff, by her actions, knowingly, voluntarily, and willingly waived any rights she may otherwise have had against Allstate.

FIFTH SEPARATE AND ADDITIONAL DEFENSE

(Condition Precedent)

Allstate is informed and believes, and based thereon alleges, that Plaintiff has failed to perform certain conditions precedent to any obligations or indebtedness which Allstate otherwise would have had toward her.

SIXTH SEPARATE AND ADDITIONAL DEFENSE

(Failure to Mitigate)

Plaintiff has failed to mitigate her claimed damages.

SEVENTH SEPARATE AND ADDITIONAL DEFENSE

(Comparative Fault)

Allstate is informed and believes and, on that basis alleges, that the damages complained of, if any there are, were proximately caused by the comparative fault and negligence of Plaintiff and/or her agents and representatives. Allstate acted reasonably under the circumstances. Any recovery herein must be proportionately reduced to the extent such fault or negligence caused such damages.

EIGHTH SEPARATE AND ADDITIONAL DEFENSE

(Damage Caused by Others)

To the extent the purported damages, if any, sustained or suffered by Plaintiff were proximately caused or contributed to by the acts or omissions of other persons and entities, such acts or omissions were intervening and/or superseding cause(s) of Plaintiff's damages, thus barring Plaintiff's recovery or reducing Plaintiff's recovery against Allstate.

NINTH SEPARATE AND ADDITIONAL DEFENSE

(Estoppel)

Plaintiff is estopped from asserting the claims set forth in the Complaint.

TENTH SEPARATE AND ADDITIONAL DEFENSE

(Failure to State Claim: Punitive Damages)

The Complaint, and each and every purported cause of action, fails to state facts sufficient to constitute a claim for punitive damages against Allstate.

ELEVENTH SEPARATE AND ADDITIONAL DEFENSE

(Due Process)

Civil Code Section 3294 is unconstitutionally vague under the Due Process Clause of the California and United States Constitutions.

TWELFTH SEPARATE AND ADDITIONAL DEFENSE

(Due Process)

Any amount of punitive damages in excess of $500 would constitute an excessive fine under the California and United States Constitutions.

THIRTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Due Process)

Any award of punitive damages would violate Allstate's right to due process under both the United States Constitution and the California Constitution.

FOURTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Willful Act of Insured: Insurance Code § 533 *et seq.*)

Under Insurance Code § 533 *et seq.*, Plaintiff's right to recovery, if any, is barred as a result of her willful acts.

FIFTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Intentional Acts Exclusion)

The Complaint is barred under the policy provision excluding intentional acts.

SIXTEENTH ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each and every cause of action, is barred or limited by the following policy provision:

Exclusions – What is not covered

These coverages don't apply to:

1. loss caused intentionally by, or at the direction of, an insured person.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Complaint Barred by California Civil Code sections 1667 and 1668)

The Complaint is barred under California Civil Code sections 1667 and 1668.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Complaint Barred by California Insurance Code section 2071)

The Complaint is barred under California Insurance Code section 2071.

NINETEENTH SEPARATE AND ADDITIONAL DEFENSE

(Exclusions From Coverage)

The Complaint, and each and every cause of action therein, is barred because Plaintiff's loss is not a "direct loss" as that term is defined in the subject policy.

TWENTIETH SEPARATE AND ADDITIONAL DEFENSE

(Unclean Hands)

Plaintiff's claims are barred by the doctrine of unclean hands.

TWENTY-FIRST SEPARATE AND ADDITIONAL DEFENSE

(Limitation on Non-Economic Damages)

While denying the allegations of the Complaint, Allstate alleges that if Plaintiff recovers, then under California Civil Code section 1431.1, *et seq.*, Allstate is not liable for any non-economic damages that are not directly proportional to its respective percentage of fault.

TWENTY-SECOND SEPARATE AND ADDITIONAL DEFENSE

(Misrepresentation In Insurance Application: Insurance Code § 330 *et. seq.*)

The Complaint, and each cause of action therein, is barred by the terms of the Policy and the related Insurance Code section 331, which provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance." Under Insurance Code section 330, "Neglect to communicate that which a party knows, and ought to communicate, is concealment."

TWENTY-THIRD ADDITIONAL DEFENSE

(Exclusions From Coverage)

The Complaint, and each cause of action therein, is barred by the following policy endorsement:

California Amendatory Endorsement – AV2250-6

1. In the **General** provisions, the following changes are made:

A. The following provisions are added:

Fraud

This policy will not apply to any claim in which an insured person has concealed or misrepresented any material fact or circumstance.

TWENTY-FOURTH ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each cause of action therein, is barred by the following policy endorsement:

Action Against Allstate

No one may sue **us** under this coverage unless there is full compliance with all the policy terms.

TWENTY-FIFTH ADDITIONAL DEFENSE

(Failure to Cooperate)

Plaintiff's failure to cooperate with Allstate's investigation of her claim bars the Complaint.

TWENTY-SIXTH ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each and every cause of action, is barred or limited by the following policy provision:

What You Must Do If There Is A Loss

1. As soon as possible, any person making claim must give **us** written proof of loss. It must include all details reasonably required by **us. We** have the right to inspect the damaged property. **We** must require any person making claims to file with **us** a sworn proof of loss. **We** may also require that person to submit to examinations under oath.

* * *

3. Report all theft losses promptly to the police.

TWENTY-SEVENTH ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each and every cause of action, is barred or limited by the following policy provision:

1. The following provisions is added:

Loss Payable Clause

If a Lienholder and/or Lessor is shown on the Policy Declarations, **we** may pay loss or damage under this policy to **you** and the Lienholder and/or Lessor as its interest may appear, except:

1. Where fraud, misrepresentation, material omission, or intentional damage has been committed by or at the direction of **you.**

2. When the vehicle(s) is intentionally damaged, destroyed or concealed by or at the direction of **you** or any owner.

TWENTY-EIGHTH ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each cause of action therein, is barred because Plaintiff failed to:

Assistance and Cooperation

When **we** ask, an insured person must cooperate with **us** in the investigation. . .

TWENTY-NINTH ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each and every cause of action, is barred or limited by the following policy provision:

Limited Mexico Coverage

For **your** protection you should purchase insurance from a company licensed in Mexico. However, the coverage of this policy for an insured private passenger or **utility auto** is extended to cover that **auto** within the Republic of Mexico. This coverage applies only while the insured **auto** is within 75 miles of the United States border and only for a period not to exceed ten days after each separate entry into the Republic of Mexico.

If Loss or damage occurs which may require repairs of the insured **auto** or replacement of any part(s) while the **auto** is in Mexico territory, the basis for adjustment of the claim will be as follows:

The repair or replacement costs will not exceed the cost of having the repairs or replacement made at the nearest point in the United States where the repairs of replacements can be made. The cost for towing, transportation and salvage operations of the auto while within Mexican territory are not covered under this policy.

THIRTIETH ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each and every cause of action, is limited by the following policy provision:

Duty to Report Policy Changes

Your policy was issued in reliance on the information **you** provided concerning **autos** and persons insured by the policy. To properly insure **your auto, you** should promptly notify **us** when **you** change **your** address or whenever any **resident operators insured by resident operators insured by our** policy are added or deleted.

THIRTY-FIRST ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each and every cause of action, is limited by the following policy provision:

COVERAGE UU

Rental Reimbursement Coverage

If **your** have collision or comprehensive coverage under this policy and the loss involves either coverage, **Allstate** will reimburse **our** for **your** cost of renting an **auto** from a rental agency or garage. **We** will not pay more than the dollar amount per day, shown on the Policy Declarations. **We** won't pay mileage or fuel charges. **We** won't pay for collision damage waiver insurance charges.

If **your** insured **auto** is stolen, payment for transportation expenses will be made under the terms of paragraph 3. of "Additional Payments Allstate Will Make." However, the limits for this coverage will apply if they exceed the limits stated under "Additional Payments Allstate Will Make."

If **your** insured **auto** is disabled by a collision or comprehensive loss, coverage starts the day after the loss. If it is drivable, coverage starts the day after the **auto** is taken to a garage for repairs.

Coverage ends when whichever of the following occurs first:

1. if the **auto** is disabled by a collision or comprehensive loss, completion of repairs or replacement of the **auto**;

2. if the **auto** is stolen when we offer settlement or **your auto** is returned to use; or

3. thirty full days of coverage.

THIRTY-SECOND ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each and every cause of action, is limited by the following policy provision:

Limits of Liability

Allstate's limit of liability is the actual cash value of the property or damaged part of the property at the time of loss. The actual cash value will be reduced buy the deductible for each coverage as shown on the Policy Declarations. However, **our** liability will not exceed what it would cost to repair or replace the property or part with other of like kind that quality. The limit for loss to any covered trailer not described on the Policy Declarations is $500.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Privilege)

The Complaint, and each cause of action therein, is barred or limited, because it relates to privileged conduct.

THIRTY-FOURTH ADDITIONAL DEFENSE

(No Liability for Independent Contractor Conduct)

Plaintiff's Complaint is barred or limited because Allstate cannot be held liable for any damages caused by the conduct of an independent contractor.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(Offset)

Allstate is entitled to an offset against plaintiff.

THIRTY-SIXTH SEPARATE AND ADDITIONAL DEFENSE

(Standing)

Plaintiff lacks standing to assert some or all of the claims set forth in the Complaint or damages for specific items. Her claims therefore are barred.

THIRTY-SEVENTH SEPARATE AND ADDITIONAL DEFENSE

(Insurable Interest: Insurance Code § 280 *et seq.*)

Under Insurance Code § 280 *et seq.*, Plaintiff's claims are barred or limited to the extent she lacked an insurable interest at issue in the loss.

THIRTY-EIGHTH ADDITIONAL DEFENSE

(Policy Provision)

The Complaint, and each cause of action therein, is barred or limited by the insurable interest provision in the policy.

THIRTY-NINTH SEPARATE AND ADDITIONAL DEFENSE

(Collateral Estoppel)

Plaintiff's claims may be barred in whole or in part by collateral estoppel.

FORTIETH SEPARATE AND ADDITIONAL DEFENSE

(Release of Liability)

Plaintiff's conduct has released Allstate of any liability it might have had.

FORTY-FIRST SEPARATE AND ADDITIONAL DEFENSE

(One-Year Provision)

The Complaint, and each and every cause of action, is barred by the one-year limitations provision in the Allstate policy purchased by the Plaintiff.

FORTY-SECOND SEPARATE AND ADDITIONAL DEFENSE

(Statute of Limitations)

In the event the claims are not governed under the one-year statute of limitations, Allstate is informed and believes, and based thereon alleges, that the Complaint, and each purported cause of action, is barred by the applicable statute of limitations including, but not limited to, California Code of Civil Procedure sections 337(1); and 343.

FORTY-THIRD SEPARATE AND ADDITIONAL DEFENSE

(Laches)

Plaintiff is barred from any recovery against Allstate to the extent his Complaint is subject to the doctrine of laches and his undue delay in commencing and prosecuting this litigation.

FORTY-FOURTH ADDITIONAL DEFENSE

(Additional Unknown Defenses)

Allstate is informed and believe and thereupon alleges that it may have other affirmative defenses of which it is presently unaware; Allstate reserves the right to allege additional affirmative defenses upon the discovery of additional facts during the course of this litigation.

WHEREFORE, Allstate prays as follows:

1. That Plaintiff takes nothing by way of her Complaint;
2. For costs of suit herein; and
3. For such other relief as the court deems just and proper.

DATED: September 4, 2008 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: [signature]
John D. Edson
Attorneys for Defendant
Allstate Indemnity Company

101115966.1

PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 600 West Broadway, Suite 2600, San Diego, California 92101-3372.

On September 4, 2008, I served true copies of the following document(s) described as:

- **DEFENDANT ALLSTATE INDEMNITY COMPANY'S ANSWER TO PLAINTIFF'S COMPLAINT**

on the interested parties in this action as follows:

J. Manuel Sanchez, Esq.
J. MANUEL SANCHEZ & ASSOCIATES
482 W. San Ysidro Boulevard, Suite 3
San Ysidro, CA 92173
Tel: (619) 662-2080
Fax: (619) 662-2048

Attorneys for Plaintiff Oralia Martinez

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Luce, Forward, Hamilton & Scripps LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY FAX TRANSMISSION:** I faxed a copy of the document(s) to the persons at the fax numbers listed above. The telephone number of the sending facsimile machine was 619.232.8311. No error was reported by the fax machine that I used.

☐ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 4, 2008, at San Diego, California.

Cheryl Wiles
CHERYL WILES

101089938.1

EXHIBIT C

J. Manuel Sanchez, Esq. State Bar No. 74994
J. MANUEL SANCHEZ & ASSOCIATES
Attorneys at Law
482 W. San Ysidro Boulevard, Suite 3
San Ysidro, California 92173
T: (619) 662-2080
F: (619) 662-2048

Attorneys for Plaintiff Oralia Martinez

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CENTRAL JUDICIAL DISTRICT

ORALIA MARTINEZ, Plaintiff, v. ALLSTATE INDEMNITY COMPANY, DOES 1 through 50, inclusive, Defendants.	Case No. 37-2008-00069884-CU-IC-SC STATEMENT OF DAMAGES (C.C.P. SECTION 425.11) Dept: C-71 Action Filed: April 11, 2008

TO: DEFENDANT ALLSTATE INDEMNITY COMPANY AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that pursuant to Code of Civil Procedure section 425.11, Plaintiff ORALIA MARTINEZ submits the following nature and amount of damages:

1. For the sum of $1,000,000 representing the amount of the judgment in excess of the policy limits, together with interest thereon at the legal rate from the date of the judgment.

2. For damages in the approximate amount of $45,000 for the value of the 2004 GMC automobile and loss of use.

3. For general damages for pain, suffering and emotional distress damages in the amount of $100,000.

///

4. For past and future personal medical and related expenses in the approximate amount of $50,000.

5. For attorneys fees in the amount according to proof.

6. Plaintiff reserves the right to seek exemplary and punitive damages in the amount of $1,000,000.

7. For costs of suit incurred herein.

DATED: August 28, 2008

J. Manuel Sanchez, Esq.
Attorney for Plaintiff Oralia Martinez

J. Manuel Sanchez, Esq.
J. Manuel Sanchez & Associates
482 W. San Ysidro Blvd. #3
San Ysidro, CA 92173
T (619) 662-2080
F (619) 662-2048

Attorneys for Petitioner Oralia Martinez

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

Martinez v. Allstate

DECLARATION OF SERVICE BY MAIL

Case No. 37-2008-00069884-CU-IC-SC

I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 482 W. San Ysidro Blvd., Suite 3, San Ysidro, CA 92173

I caused to be served, the following documents:

- STATEMENT OF DAMAGES

by placing a copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

John D. Edson
LUCE, FORWARD, HAMILTON & SCRIPPS, LLP
600 W. Broadway, Suite 2600
San Diego, CA 92101-3372

I then sealed each envelope and with the postage thereon fully prepaid deposited each in the United States Postal Service at San Ysidro, California, on August 28, 2008.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 8/28/08

Christian Cruz

Peter H. Klee, State Bar No. 111707
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

Attorneys for Defendant Allstate Indemnity Company

FILED
SOUTH COUNTY
2008 MAY 23 P 3:57
CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SOUTH COUNTY JUDICIAL DISTRICT

ORALIA MARTINEZ ,

Plaintiff,

v.

ALLSTATE INDEMNITY COMPANY,

Defendant.

Case No. 37-2008-00069884-CU-IC-SC

ALLSTATE'S NOTICE OF DEMURRER AND DEMURRER TO PORTIONS OF PLAINTIFF'S COMPLAINT
[Code Civ. Proc. § 430.10 *et seq.*]

Date:	August 8, 2008
Time:	8:30 am
Judge:	William S. Cannon
Dept.:	S-04
Comp. Filed:	April 11, 2008

TO PLAINTIFF AND HER ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on August 8, 2008 at 8:30 a.m. in Department 4 of the above-referenced court located at 500 3rd Avenue, Chula Vista, California 91910, defendant Allstate Insurance Company will and hereby does demurrer to portions of the complaint pursuant to California Code of Civil Procedure section 430.10 *et seq*.

Martinez's third cause of action for "unfair claim settlement practices" fails to state facts sufficient to constitute a cause of action against Allstate. Cal. Code Civ. Proc. § 430.10(e). The claim is also redundant with the second cause of action for breach of the implied covenant of good faith and fair dealing.

Martinez's fourth cause of action for injunctive relief and restitution fails to state facts sufficient to constitute a cause of action against Allstate. Cal. Code Civ. Proc. § 431.10(e). In the alternative, the fourth cause of action is uncertain, ambiguous and unintelligible. Cal. Code Civ. Proc. § 430.10(f). The cause of action fails to identify a statute giving rise to the cause of action.

Martinez's fifth cause of action for "improper disclosure of confidential information" fails to state facts sufficient to constitute a cause of action against Allstate. Cal. Code Civ. Proc. § 430.10(e). In the alternative, the fifth cause of action is uncertain, ambiguous and unintelligible. Cal. Code Civ. Proc. § 430.10(f). The cause of action fails to identify a statute giving rise to the cause of action.

This demurrer is based upon this notice of demurrer and memorandum of points and authorities, Allstate's concurrently filed notice of foreign authorities, the reply brief, arguments raised a time of oral argument and any other matters that the Court may consider or take judicial notice of at or before the time of hearing on this motion.

DATED: May 23, 2008 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: [signature]
John D. Edson
Attorneys for Defendant
Allstate Insurance Company

101095466.1

FILED
SOUTH COUNTY
2008 MAY 23 P 3:5
CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

Peter H. Klee, State Bar No. 111707
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

Attorneys for Defendant Allstate Indemnity Company

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SOUTH COUNTY JUDICIAL DISTRICT

ORALIA MARTINEZ,

Plaintiff,

v.

ALLSTATE INDEMNITY COMPANY,

Defendant.

Case No. 37-2008-00069884-CU-IC-SC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ALLSTATE'S DEMURRER TO PLAINTIFF'S COMPLAINT

Date: August 8, 2008
Time: 8:30 am
Judge: William S. Cannon
Dept.: S-04
Comp. Filed: April 11, 2008

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

III. MARTINEZ' CLAIM FOR RESTITUTION AND INJUNCTIVE RELIEF IS IMPROPER 4

A. Martinez Cannot Pursue a Claim for Equitable Relief Because She Has Adequate Remedies at Law 4

B. Restitution Also Cannot Be Used to Seek Monies Under an Insurance Policy 5

C. Martinez' Claim for Injunctive Relief Is Also Improper 6

1. Martinez Cannot Use a Claim for Injunctive Relief to Correct Past Conduct 6

2. Martinez Cannot Enjoin a Breach of Contract 7

3. The Proposed Injunction Is Impermissibly Vague 7

IV. MARTINEZ' CAUSE OF ACTION FOR BREACH OF CONFIDENTIAL INFORMATION IS ALSO IMPROPER 8

V. CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Amato v. Mercury Cas. Co.,
53 Cal. App. 4th 825 (1997) 4

Averbuch v. Home Ins. Co.,
114 A.D. 2d 827 (N.Y. 1985) 9

Bank of America v. Williams,
89 Cal. App. 2d 21 (1948) 7

Brownfield v. Daniel Freeman Marina Hosp.,
208 Cal. App. 3d 405 (1989) 5

Cisneros v. U.D. Registry, Inc.,
39 Cal. App. 4th 548 (1995) 6

E.A. Taliaferro v. Dorothy Taliaferro,
144 Cal. App. 2d 109 (1956) 5

E.H. Renzel Co. v. Warehousemen's Union,
16 Cal. 2d 369 (1940) 6, 7

East Bay Mun. Utility Dist. v. Dept. of Forestry & Fire Protection,
43 Cal. App. 4th 1113 (1996) 6

Ford v. Manufacturers Hanover Mortgage Corp.,
831 F.2d 1520 (9th Cir. 1987) 3

Gibson v. Government Employees Ins. Co.,
162 Cal. App. 3d 441 (1984) 3

Gold v. Los Angeles Democratic League,
49 Cal. App. 3d 365 (1975) 6

Halcome v. Cincinnati Ins. Co.,
254 Ga. 742 (1985) 9

Harary v. Allstate Ins. Co.,
988 F. Supp. 93 (E.D. N.Y. 1997) 8

Knox v. Phoenix Leasing,
29 Cal. App. 4th 1357 (1994) 5

Kraus v. Trinity Management Services, Inc.,
23 Cal. 4th 116 (2000) 5

Madrid v. Perot Systems Corp.,
130 Cal. App. 4th 440 (2005) 5

McKay v. Retail Auto. Salesmen's Local Union,
16 Cal. 2d 331 (1940) 6

McMillan Scripps North Partnership v. Royal Ins. Co. of America,
19 Cal. App. 4th 1215 (1993) 3

Moradi-Shalal v. Fireman's Fund Ins. Cos.,
46 Cal. 3d 287 (1988) 2, 3

Nachum v. Allstate Ins. Co.,
1997 U.S. Dist. LEXIS 12670 (C.D. Cal. 1997) 6

New Plumbing Contractors, Inc. v. Nationwide Mut. Ins. Co.,
7 Cal. App. 4th 1088 (1992) 3

Opsal v. U.S.A.A.,
2 Cal. App. 4th 1197 (1991) 3

Othman v. Globe Indemnity Co.,
759 F.2d 1458 (9th Cir. 1985) 8

Philpott v. Superior Court,
1 Cal. 2d 512 (1934) 5

Pisa v. Underwriters at Lloyd's, London,
787 F. Supp. 283 (D.R.I. 1992) 9

Pitchess v. Superior Court,
2 Cal. App. 3d 644 (1969) 7

Prudential Home Mortgage Co. v. Superior Court,
66 Cal. App. 4th 1236 (1998) 5

Racine & Laramie, Ltd. v. Department of Parks & Recreation,
11 Cal. App. 4th 1026 (1992) 3

Robinson v. National Auto. & Cas. Ins. Co.,
132 Cal.App.2d 709 (1955) 8

Sover v. Aetna Cas. & Surety Co.,
658 F. Supp. 156 (S.D. W.Va. 1987) 9

Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.,
255 Cal. App. 2d 300 (1967) 7

Tomaselli v. Transamerica Ins. Co.,
25 Cal. App. 4th 1766 (1994) 3

Tricor California Inc. v. Superior Court,
220 Cal. App. 3d 880 (1990) 3

U.S. Fidelity & Guar. Co. v. Conaway,
674 F.Supp. 1270 (N.D. Miss. 1987) 9

Waller v. Truck Ins. Exch.,
11 Cal. 4th 1 (1995) 2, 3

Wood v. Allstate Ins. Co.,
21 F.3d 741 (7th Cir. 1994) 8

Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.,
12 Cal. App. 4th 501 (1993) 4

Zephyr Park, Ltd. v. Superior Court,
213 Cal. App. 3d 883 (1989) 3

STATUTES

Business and Professions Code section 17200 5

California Civil Code section 3300 4

California Code of Civil Procedure section 526(b)(5) 7

California Insurance Code section 790.03 3,22

California Insurance Code section 790.03(h) 4

I.

INTRODUCTION

This lawsuit stems from an alleged October 2006 theft of a car owned by Oralia Martinez in Tijuana Mexico. Martinez made a claim to her insurer, Allstate. Allstate investigated the claim and concluded that the claim was not covered due to material misrepresentations that Martinez made during the presentation of her claim.

Martinez responded by suing Allstate for breach of contract and for breach of the implied covenant of good faith and fair dealing. Although those claims are meritless, Allstate does not challenge those two causes of action at the pleading stage.

Martinez' complaint is, however, defective because she has alleged three additional improper claims. These include the following:

Breach of unfair settlement practices. Martinez' third cause of action for alleged "unfair settlement practices" is premised upon her assumption that she has standing to sue for alleged breaches of the Insurance Code. She is mistaken. Nearly 20 years ago, the California Supreme Court made clear that private litigants do not have standing to sue for alleged breaches of the Insurance Code. Furthermore, to the extent that Martinez' claim repeats her bad faith allegations, the claim is redundant and improper.

Restitution and injunctive relief. Martinez' fourth cause of action seeks restitution and injunctive relief against Allstate in order to be paid under the policy. As a preliminary matter, this cause of action fails because Martinez failed to identify any authority which would allow her to sue for restitution and injunctive relief. Even if she had identified such authority, her claims for restitution and injunctive relief would still fail because these are equitable remedies that are only available when a party has no adequate remedy at law. Here, Martinez seeks to be paid monies under her contract claim. Because she has an adequate remedy at law, this cause of action is improper.

Her restitution claim is also improper because there is nothing which could be "restored" to her. The only monies that Martinez has given to Allstate are her policy premiums. Martinez has not asked to have the policy rescinded. Indeed, she seeks to have it enforced. Thus, there is no basis to have her policy premiums "restored" to the plaintiff. Likewise, injunctive relief is only available to correct impending future harm. It cannot be used to address alleged past wrongs, such as the alleged wrongful denial of a claim. It cannot be used to enjoin a breach of contract as Martinez seeks to do here. Finally, Martinez fails to specify what specific conduct she seeks to have enjoined. For this additional reason, the claim is improper.

Improper disclosure of confidential information. Martinez has also sued Allstate for obtaining her financial records in connection with its claim investigation. This cause of action is again improper because Martinez fails to identify any authority which would give her a right to sue for this alleged conduct. Nor could she identify such a statute if given leave to amend. Court's have repeatedly affirmed an insurer's right to ask for an insured's financial records when investigating suspicious claims. Thus, Martinez cannot sue Allstate for requesting her financial records.

For these reasons, the Court should sustain Allstate's demurrer to the third, fourth and fifth causes of action.

II.

MARTINEZ CANNOT SUE FOR ALLEGED BREACHES OF THE INSURANCE CODE

Martinez alleges that Allstate's actions constituted "violations of the fair claims settlement practice regulations." (Complaint ¶ 31.) She identifies a list of specific alleged violations from the statute that she believes Allstate violated. (Complaint ¶ 30(a-h).)

Martinez' attempt to use the California Insurance Code as a basis for a second bad faith claim runs afoul of long-standing California law. In the case of Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 304 (1988), the California Supreme Court held that an individual does not have a private right of action to sue for alleged violations of the California Insurance Code and its interpretive regulations.

In Waller v. Truck Ins. Exch., 11 Cal. 4th 1, 36 (1995), the California Supreme Court again held that obligations imposed by the implied covenant arise from the *insurance contract*, not from Insurance Codes or other any matter extrinsic to the express terms of the contract:

> [T]he covenant is implied as a supplement to the *express* contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement. . . . *Absent that contractual right, however, the implied covenant has nothing upon which to act as a supplement, and should not be endowed with an existence independent of its contractual underpinnings.*

(emphasis added).[1]

An insured also cannot predicate a bad faith claim based upon alleged violations of the Insurance Code. E.g. Opsal v. U.S.A.A., 2 Cal. App. 4th 1197, 1206 n.5 (1991) (rejecting alleged violation of § 790.03 as standard for bad faith claim noting "the mere fact that [the insurance company] violated the Insurance Code . . . will not support a bad faith" claim); McMillan Scripps North Partnership v. Royal Ins. Co. of America, 19 Cal. App. 4th 1215 (1993) (same); Tricor California Inc. v. Superior Court, 220 Cal. App. 3d 880, 887 (1990) (same).

If an insurance company violates one of these regulations, the Insurance Commissioner may conduct administrative hearings and, if appropriate, impose administrative sanctions. These regulations, however, have nothing to do with the implied covenant in a given insurance contract because they exist *independently* of the insurance contract. Thus, punishment for the violation of an administrative regulation is within the exclusive province of the Insurance Commissioner. Waller v. Truck Ins. Exch., 11 Cal. 4th 1, 36 (1995) ("our holding [rejecting action for breach of the implied covenant] does not foreclose the Insurance Commissioner from imposing administrative sanctions against an insurance company responsible for committing unfair practices that are independent of the insurance contract and proscribed by section 790.03"); Moradi-Shalal, 46 Cal. 3d at 304; Zephyr Park, Ltd. v. Superior Court, 213 Cal. App. 3d 883 (1989).

---

[1] Accord, Tomaselli v. Transamerica Ins. Co., 25 Cal. App. 4th 1766, 1771-72 (1994) ("the obligation of 'good faith' conduct does not exist independent of an express contractual obligation, but must be appurtenant to express contractual duties"); Racine & Laramie, Ltd. v. Department of Parks & Recreation, 11 Cal. App. 4th 1026, 1031-32 (1992) ("The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy"); New Plumbing Contractors, Inc. v. Nationwide Mut. Ins. Co., 7 Cal. App. 4th 1088, 1096 (1992) ("neither the duty nor the covenant of good faith and fair dealing extends beyond the terms of the insurance contract in force between the parties"); Gibson v. Government Employees Ins. Co., 162 Cal. App. 3d 441, 448 (1984) ("[W]e have not found [] any case which extends . . . a covenant of good faith and fair dealing owed by an . . . insurance company to its insured beyond the terms of the insurance contract in force between them."); Ford v. Manufacturers Hanover Mortgage Corp., 831 F.2d 1520, 1524 (9th Cir. 1987) (the covenant of good faith and fair dealing will not be implied to vary the express terms of a contract).

In short, neither Section 790.03(h) nor the interpretive regulations create a private right of action. Both are limited to use by the Insurance Commissioner. Allowing Martinez to assert a second bad faith cause of action based upon an alleged breach of Insurance Code violations would simply end-run this long-standing rule.

If Martinez contends that Allstate acted in bad faith, her remedy was to assert a bad faith claim. Because she has already done so, her third cause of action is redundant and improper.

Accordingly, Allstate's demurrer to Martinez' third cause of action should be sustained.

III.

MARTINEZ' CLAIM FOR RESTITUTION AND INJUNCTIVE RELIEF IS IMPROPER

Martinez' fourth cause of action for restitution and injunctive relief also fails to state a claim. As a preliminary matter, Martinez has failed to identify any statute which would provide for the right to sue for restitution and injunctive relief. For this reason alone, her claim fails. The claim fails for several other reasons as well.

A. Martinez Cannot Pursue a Claim for Equitable Relief Because She Has Adequate Remedies at Law

Martinez' fourth cause of action also fails because the claims of restitution and injunctive relief are equitable claims that are not available where, as here, a plaintiff has an adequate remedy at law. Here, Martinez alleges that Allstate has "denied coverage" and that coverage will "continue to be denied due to the unlawful claims practices of defendants, and each of them." (Complaint ¶ 34.)

A claim for allegedly unpaid contract benefits, however, is a quintessential claim for breach of contract. Amato v. Mercury Cas. Co., 53 Cal. App. 4th 825, 831 (1997) (breach of insurance contract gives rise to contract damages under Civil Code section 3300); Xebec Development Partners, Ltd. v. National Union Fire Ins. Co., 12 Cal. App. 4th 501, 535 (1993) (failure to pay indemnity underinsurance contract gives rise to claim for contract damages). Indeed, Martinez has also sought to recover the same contract benefits that she claims are owed through her breach of contract and bad faith claims. (See, Complaint ¶¶ 20-21, 25-27.)

Because Martinez has an adequate remedy at law for the allegedly withheld benefits, she cannot pursue equitable claims for restitution and injunction. Knox v. Phoenix Leasing, 29 Cal. App. 4th 1357 (1994); E.A. Taliaferro v. Dorothy Taliaferro, 144 Cal. App. 2d 109, 113 (1956) ("There being an available legal remedy equitable relief is not available, and the complaint, therefore, does not state a cause of action for equitable relief.").

To state a cause of action for equitable relief, a plaintiff must plead facts, showing that the wrongful acts constitute an actual or threatened injury to property or personal rights which cannot be compensated by an ordinary damage reward. Brownfield v. Daniel Freeman Marina Hosp., 208 Cal. App. 3d 405, 409-410 (1989) (sustaining demurrer to equitable claim under Business and Professions Code section 17200 because "there were no allegations demonstrating the inadequacy of legal remedies."); Prudential Home Mortgage Co. v. Superior Court, 66 Cal. App. 4th 1236, 1250 (1998) (claim for equitable relief under Business and Professions Code section 17200 are not available because plaintiff had adequate remedies of law); Philpott v. Superior Court, 1 Cal. 2d 512, 517 (1934) ("a proper exercise of the equitable jurisdiction will not give equitable relief in any case where the legal remedy is full and adequate and does complete justice. No principal of equitable jurisdiction is more established than this.").

Because Martinez has adequate legal remedies for her claim for breach of contract, her claim for restitution and injunctive relief fail.

B. Restitution Also Cannot Be Used to Seek Monies Under an Insurance Policy

Martinez' claim for restitution also fails because the remedy of restitution cannot be used to seek performance on a policy contract. Restitution is an equitable remedy that can, in some cases, be used to order a defendant to "return money" that a defendant has wrongfully obtained from a plaintiff. Kraus v. Trinity Management Services, Inc., 23 Cal. 4th 116, 126-27 (2000). Here, the only thing that Martinez could have "returned" to her under her restitution claim would be the premiums that she previously paid on her policy. Madrid v. Perot Systems Corp., 130 Cal. App. 4th 440, 453 (2005). Martinez, however, has not sought to have the policy rescinded. Indeed, she seeks to have the policy enforced with monies paid under the insurance policy. Thus, there is nothing that Martinez could have restored to her.

C. Martinez' Claim for Injunctive Relief Is Also Improper

Finally, even if Martinez could seek equitable relief, Martinez cannot seek injunctive relief for several reasons. A claim for injunctive relief can only be used to correct impending future injury. It cannot be used to correct the alleged past wrongs of an insured's claim. Injunctive relief also cannot be used to enjoin a breach of contract as Martinez seeks to do. Furthermore, Martinez' request for injunctive relief is undefined and therefore improper.

1. Martinez Cannot Use a Claim for Injunctive Relief to Correct Past Conduct

Martinez' request for injunctive relief is improper because she is suing to correct allegedly wrongly conduct that happened more than a year ago. "An injunction properly issues only where the right to be protected is clear, injury is impending and so immediately likely as only to be avoided by issuance of the injunction." East Bay Mun. Utility Dist. v. Dept. of Forestry & Fire Protection, 43 Cal. App. 4th 1113, 1126 (1996).

Injunctions cannot be granted as punishment for past acts. Cisneros v. U.D. Registry, Inc., 39 Cal. App. 4th 548, 574 (1995). Furthermore, "[a] complaint for an injunction which alleges only general conclusions, not warranted by any pleading of facts, does not state a cause of action to enjoin the acts complained of." E.H. Renzel Co. v. Warehousemen's Union, 16 Cal. 2d 369, 373 (1940) (emphasis added); accord McKay v. Retail Auto. Salesmen's Local Union, 16 Cal. 2d 331 (1940) ("It is a fundamental principle that the drastic sanction of equity may not be invoked without a detailed showing of specific facts justifying such relief.").

Martinez does not meet these standards. She does not plead facts showing any impending threatened injury. She alleges a variety of acts that purportedly occurred *during* her own insurance claim. The conduct at issue in the request for an injunction occurred between October 26, 2006 and May 17, 2007. (Complaint ¶ 13.) Because there are no ongoing acts alleged in the Complaint, the request for an injunction is moot. See Gold v. Los Angeles Democratic League, 49 Cal. App. 3d 365, 372 (1975) (dismissing request for injunction because the acts in controversy were completed before the complaint was filed); Nachum v. Allstate Ins. Co., 1997 U.S. Dist. LEXIS 12670 at *20 (C.D. Cal. 1997) (striking request for an injunction regarding an insurance claim because the claim was closed and the issue was moot).

Martinez has also not alleged with specificity any type of ongoing conduct. "[T]he rule for drafting a pleading which asks for the interposition of equitable relief demands a statement of the specific facts upon which relief is sought. Inferences, generalities, presumptions, and conclusions have no place in such a pleading." Bank of America v. Williams, 89 Cal. App. 2d 21, 24 (1948) (citation and quotation omitted); accord E.H. Renzel, 16 Cal. 2d at 373 (complaint which alleges only general conclusions, unsupported by pleaded facts, does not state a cause of action for injunctive relief.) Put simply, Martinez must plead facts showing the specific acts Allstate is currently taking or threatening to take that she wants the Court to enjoin. But the only specific facts set forth in the complaint concern the prior handling of Martinez' own claim. Therefore, the claim for injunctive relief fails as a matter of law.

2. Martinez Cannot Enjoin a Breach of Contract

Martinez' injunctive relief claim is also improper because her claim is really an attempt to enjoin Allstate from breaching her policy. But California law expressly disallows granting injunctive relief to prevent the breach of a contract. Code Civ. Proc. § 526(b)(5); Thayer Plymouth Center, Inc. v. Chrysler Motors Corp., 255 Cal. App. 2d 300, 303-04 (1967). Because that is what she seeks to do here, her claim is improper.

3. The Proposed Injunction Is Impermissibly Vague

Finally, Martinez fails to specify what she hopes to enjoin. (Complaint ¶ 33-35.) Failing to specify what conduct that a plaintiff seeks to have enjoined is improper:

> An injunction must be definite enough to provide a standard of conduct for those whose activities are proscribed, as well as a standard for the ascertainment of violations of the injunctive order by the courts called upon to apply it. An injunction which forbids an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application exceeds the power of the court.

Pitchess v. Superior Court, 2 Cal. App. 3d 644, 651 (1969).

It's impossible to tell what conduct Martinez seeks to have enjoined. And simply ordering Allstate not to be unfair would be an order fraught with vagueness. Whenever insureds are dissatisfied with how Allstate handled a claim, neither they nor Allstate will know whether the injunction is violated; they will simply be left to guess one way or the other. Such an injunction is impermissibly vague. That is another reason to strike the claim for injunctive relief.

For these reasons, the Court should sustain Allstate's demurrer to the fourth cause of action.

IV.

MARTINEZ' CAUSE OF ACTION FOR BREACH OF CONFIDENTIAL INFORMATION IS ALSO IMPROPER

Martinez' fifth cause of action alleges that Allstate improperly asked for bank records and other confidential documents in connection with her claim. Her complaint suggests that she would not have given Allstate her financial records if she knew that the lawyer who asked for them represented Allstate. (Complaint ¶ 37-38.) Martinez, however, fails to identify any authority that would provide her with a right to sue for this alleged conduct. Martinez' cause of action fails for this reason alone.

More importantly, Martinez cannot sue Allstate for seeking her financial records when it had a right under her policy to request these records in the first place. Indeed, courts have repeatedly terminated lawsuits where an insured failed to provide his or her financial records in the context of the investigation of a suspicious claim. E.g. Othman v. Globe Indemnity Co., 759 F.2d 1458, 1465 (9th Cir. 1985) (insurer properly denied an initial claim where the information that the insured refused to furnish included "bank records, financial condition, [and] source of the cash to acquire the abnormal inventory. The information was material. Without it, Globe lacked relevant information that might help to prove who set the fire."); Robinson v. National Auto. & Cas. Ins. Co., 132 Cal.App.2d 709, 713-14 (1955) (insured violated cooperation clause and policy when she refused to divulge where she obtained the money to buy the allegedly stolen jewelry).

This is the rule throughout the country.[2]

---

[2] I.e., Wood v. Allstate Ins. Co., 21 F.3d 741, 747 (7th Cir. 1994) (reversing summary judgment on different grounds: "where the possibility of fraud is raised that an insured torched her own house in order to collect on the insurance policy, the financial condition of the insured is plausibly at issue."); Harary v. Allstate Ins. Co., 988 F. Supp. 93, 106 (E.D. N.Y. 1997) (plaintiff breached her duties under the policy where she failed to provide his tax returns: "Plaintiff does not, indeed cannot, dispute that she failed to provide Allstate with her 1991 and 1992 income, evidence of her financial status that is materially relevant

Thus, Martinez has no right to sue Allstate for requesting her financial documents in the context of her claim. Even if Martinez could allege that Allstate acted improperly in seeking her financial records, her remedy was to assert a claim of bad faith, which she has already done.

Thus, the Court should sustain Allstate's demurrer to the fifth cause of action.

V.

CONCLUSION

For the reasons stated herein, Allstate requests that the Court sustain Allstate's demurrer to the third, fourth and fifth causes of action.

DATED: May 23, 2008 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: [signature]
John D. Edson
Attorneys for Defendant
Allstate Insurance Company

101091443.2

---

to her fire loss claim on the incendiary destruction of her home."); Pisa v. Underwriters at Lloyd's, London, 787 F. Supp. 283, 285–6 (D.R.I. 1992) (insured breached its policy obligations by failing to provide its financial records in connection with an arson claim: "Underwriters have attempted to learn about Pisa's actions on the night of the fire and examine the financial condition of Pisa's business before the fire. This is a legitimate inquiry. (Citation omitted) But Pisa has frustrated underwriters at every turn."); Sover v. Aetna Cas. & Surety Co., 658 F. Supp. 156, 160 (S.D. W.Va. 1987) ("Once the defendant has put at issue the possibility of arson, [the insured's] financial status became pertinent."); U.S. Fidelity & Guar. Co. v. Conaway, 674 F.Supp. 1270, 1273 (N.D. Miss. 1987) ("The court concludes that Conaway's refusal to answer questions about his financial condition or provide documents about his finances was a material breach of the policy."); Averbuch v. Home Ins. Co., 114 A.D. 2d 827, 828 (N.Y. 1985) (the insured's refusal to answer questions related to his "financial status at the time" of a suspicious claim constituted a breach of the duties under the policy to cooperate); Halcome v. Cincinnati Ins. Co., 254 Ga. 742, 743-44 (1985) (insureds in suspicious automobile theft claim breached their duties under the policy when they refused to "supply information regarding to (1) their income and sources of income; (2) their bank accounts, savings accounts, account and bookkeepers . . . (4) their federal income tax returns and W-2 forms. . . .").

Peter H. Klee, State Bar No. 111707
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

Attorneys for Defendant Allstate Indemnity Company

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SOUTH COUNTY JUDICIAL DISTRICT

ORALIA MARTINEZ ,

Plaintiff,

v.

ALLSTATE INDEMNITY COMPANY,

Defendant.

Case No. 37-2008-00069884-CU-IC-SC

DEFENDANT ALLSTATE INSURANCE COMPANY'S NOTICE OF FOREIGN AUTHORITIES IN SUPPORT OF ITS DEMURRER TO PORTIONS OF PLAINTIFF'S COMPLAINT

Date: August 8, 2008
Time: 8:30 am
Judge: William S. Cannon
Dept.: S-04
Comp. Filed: April 11, 2008

FILED
CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA
SOUTH COUNTY
2008 MAY 23 P 3:51

Allstate Insurance Company hereby lodges the following foreign authorities in support of its demurrer to portions of plaintiff's complaint:

Exhibit 1. Ford v. Manufacturers Hanover Mortgage Corporation
831 F.2d 1520 (9th Cir. 1987)

Exhibit 2. Hart v. Prudential Property and Casualty Insurance Company
848 F.Supp. 900 (C.D. Nev. 1994)

Exhibit 3. Nachum, et. al. v. Allstate Insurance Company
1997 U.S. Dist. LEXIS 12670 (C.D. Cal. 1997)

Exhibit 4. Melancon, et. al. v. USAA Casualty Insurance Company
174 Ariz. 344, 849 P.2d 1374 (Ariz. 1992)

Exhibit 5. Othman, et. al. v. Globe Indemnity Company
759 F.2d 1458 (9th Cir. 1985)

Exhibit 6. Pisa v. Underwriters at Lloyd's, London
787 F. Supp. 283 (D.R.I. 1992)

Exhibit 7. Stover v. Aetna Casualty and Surety Company
658 F. Supp. 156 (S.D.W. Va. 1987)

Exhibit 8. Averbuch v. The Home Insurance Company
114 A.D.2d 827, 494 N.Y.S.2d 737 (N.Y.S.2d 1985)

Exhibit 9. Thompson v. State Farm Fire and Casualty Company
34 F.3d 932 (10th Cir. 1994)

Exhibit 10. Wood v. Allstate Insurance Company
21 F.3d 741 (7th Cor. 1994)

DATED: May 23, 2008 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: [signature]
John D. Edson
Attorneys for Defendant Allstate Indemnity Company

101095956.1

EXHIBIT 1

C

Ford v. Manufacturers Hanover Mortg. Corp.
C.A.9 (Cal.),1987.

United States Court of Appeals,Ninth Circuit.
Frank FORD, Plaintiff-Appellant,
v.
MANUFACTURERS HANOVER MORTGAGE CORPORATION, et al., Defendants/Appellees.
MANUFACTURERS HANOVER MORTGAGE CORPORATION, Third Party Plaintiff,
v.
Joan KENEGOS, Third Party Defendant.
No. 86-5789.

Argued and Submitted Sept. 9, 1987.
Decided Nov. 10, 1987.

Trustor brought action against trust deed beneficiary alleging that, under California law, beneficiary had breached implied covenant of good faith and fair dealing by refusing to permit trustor to use fire policy proceeds to rebuild his residence. The United States District Court for the Central District of California, William J. Rea, J., entered summary judgment for beneficiary, and trustor appealed. The Court of Appeals, Nelson, Circuit Judge, held that regardless of actual value of trust deed property, beneficiary was not required, under California law, to permit trustor to use fire policy proceeds to rebuild his residence.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⚷776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
District court's entry of summary judgment is reviewed de novo.

[2] Federal Courts 170B ⚷776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
District court's interpretation of state law is subject to de novo review.

[3] Federal Courts 170B ⚷761

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk759 Theory and Grounds of Decision of Lower Court
170Bk761 k. Reasons for Decision. Most Cited Cases
Upon review of district court's entry of summary judgment, Court of Appeals may affirm on any basis in record.

[4] Mortgages 266 ⚷335

266 Mortgages
266IX Foreclosure by Exercise of Power of Sale
266k335 k. Right to Foreclose. Most Cited Cases
Trust deed beneficiary's application of fire policy proceeds to trustor's overdue note would not result in beneficiary's accelerating payment on note; owing to accumulation of unpaid interest, trustor's debt significantly exceeded balance of original principal.

[5] Mortgages 266 ⚷335

266 Mortgages
266IX Foreclosure by Exercise of Power of Sale
266k335 k. Right to Foreclose. Most Cited

Cases
Under California law, issue of whether trust deed beneficiary's security is impaired normally involves factual inquiry into whether market value of trust deed property still adequately secures trustor's indebtedness.

[6] Mortgages 266 ⟹1

266 Mortgages
266I Requisites and Validity
266I(A) Nature and Essentials of Conveyances as Security
266k1 k. Nature of Mortgage in General. Most Cited Cases
Purpose of deed of trust is to provide beneficiary with recourse to sufficient collateral upon trustor's default.

[7] Mortgages 266 ⟹201

266 Mortgages
266IV Rights and Liabilities of Parties
266k201 k. Insurance. Most Cited Cases

Mortgages 266 ⟹335

266 Mortgages
266IX Foreclosure by Exercise of Power of Sale
266k335 k. Right to Foreclose. Most Cited Cases
Regardless of actual market value of trust deed property, California law did not require trust deed beneficiary to permit trustor to use fire policy proceeds to rebuild his residence; trustor was in long-standing material default on promissory note prior to fire, promissory note and accumulated interest had become due and payable in full and beneficiary was entitled to foreclose on property immediately. West's Ann.Cal.Civ.Code §§ 2924, 2924c(a).

***1520** Kenneth E. Roberson, Los Angeles, Cal., for plaintiff-appellant.
***1521** Maiden, Rosenbloom, Wintraub & Fridkis, Alvin D. Rosenbloom, Cliff Fridkis and Steven E. Shapiro, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before SCHROEDER, NELSON and NORRIS, Circuit Judges.

NELSON, Circuit Judge:
Under a standard deed of trust on real property, the trustor is generally required to maintain fire insurance on the property. The trust deed often also provides that, in the event of a fire loss, the trust deed beneficiary has the option of (1) applying the insurance proceeds to the trustor's outstanding indebtedness on the promissory note secured by the trust deed, or (2) allowing the trustor to use the proceeds to rebuild the fire-damaged property.

Under California law, however, "the right of a beneficiary to apply insurance proceeds to the balance of a note ... must be performed in good faith and with fair dealing and ... to the extent the security is not impaired the beneficiary must permit those proceeds to be used for the cost of rebuilding." *Schoolcraft v. Ross,* 81 Cal.App.3d 75, 77, 146 Cal.Rptr. 57, 58 (1978).

This case presents the issue whether, under California law, a trust deed beneficiary is required by its implied covenant to permit a trustor to use fire insurance proceeds to rebuild his residence when (1) the trustor was in long-standing material default on his promissory note prior to the fire, (2) the trustor's promissory note and accumulated interest had become due and payable in full, and (3) the trust deed beneficiary was entitled to sell the trustor's property at any time. We hold that, under these circumstances, a trust deed beneficiary is not required by California law to permit a trustor to rebuild. We affirm the district court's entry of summary judgment in favor of defendant/appellee Manufacturers Hanover Mortgage Corporation ("MHMC") and against plaintiff/appellant Frank Ford.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are undisputed. On July 11, 1979, Frank Ford bought a single-family residence ("the property") in Los Angeles and financed the purchase by executing a promissory note and deed of trust on the property in favor of Pacific Mortgage Corporation. Ford made no down payment, and the purchase price and amount of the note was $63,000.

Ford's note and trust deed were later acquired by Genstar Mortgage ("Genstar"). Genstar assigned the loan and trust deed to defendant MHMC on or about August 18, 1983.

By September 4, 1980, Ford had defaulted on his note and deed of trust, and the trustee recorded a Notice of Default and Election to Sell pursuant to Cal.Civ.Code § 2924 (West 1974). Ford's right to reinstate the note expired three months later on or about December 4, 1980, *see*Cal.Civ.Code 2924c(a) (West 1974), and at all times thereafter (except during Ford's subsequent bankruptcy), the entire balance of principal and accumulated interest has been due and payable in full.[FN1]

FN1. In 1985, Cal.Civ.Code§ 2924c was amended to provide that a trustor may generally cure a default and reinstate the note and trust deed at any time prior to five days before the trustee's sale of the property. *See*Cal.Civ.Code 2924c(e) (West Supp.1987). The 1985 amendment only applies to "foreclosure proceedings commenced by the recordation of a notice of default recorded on or after January 1, 1986." 1985 Cal.Stat. ch. 1206 § 7. In this case, the trustee recorded the notice of Ford's default in 1980, and Ford was only entitled to cure his default and reinstate his note and deed of trust by tendering the entire amount then due MHMC "within three months of the recording of the notice of default." Cal.Civ.Code § 2924c(a) (West 1974).

On May 21, 1981, Ford filed a bankruptcy petition under Chapter 13 of Title 11. After Ford defaulted under a workout negotiated with Genstar, the bankruptcy court orally granted Genstar's motion for relief from the automatic stay in June, 1982 so that Genstar could proceed with a trustee's sale. The court's written order, however, was not signed until January, 1983.

***1522** On October 1, 1982, Ford's property was substantially damaged by fire. The Los Angeles Fire Department concluded that the fire was deliberately set, but the arsonist was never identified.

At the time of the fire, the property was insured by The Travelers Indemnity Company ("Travelers"). Under Ford's deed of trust, the trust deed beneficiary had the option of either applying the insurance proceeds to reduce Ford's indebtedness or to rebuild the property.

Ford retained attorney Joan Kenegos to negotiate with Travelers, and in August, 1983, Travelers issued a check for $31,100 payable jointly to Ford, Kenegos, and Genstar. Travelers also agreed to pay out an additional $39,000 in replacement coverage if and when the property was rebuilt.

Kenegos notified Genstar that Ford intended to rebuild and requested that Genstar endorse the $31,100 check. Genstar endorsed the check and informed Kenegos that Ford's note and deed of trust had been assigned to MHMC. Kenegos then commenced negotiating with MHMC on Ford's behalf. In her letters and telephone calls to MHMC, she contended that MHMC was required by California law to permit Ford to use the insurance proceeds to rebuild his residence. MHMC, however, refused to grant Ford permission to rebuild.

On April 9, 1984, Ford filed a complaint in the district court against MHMC. The complaint alleged that, under California law, MHMC had breached its implied covenant of good faith and fair dealing by refusing to permit Ford to use the insurance proceeds to rebuild.[FN2] Pending the outcome of this litigation, the insurance proceeds were placed in a jointly-held account.

FN2. Ford's complaint also set forth four additional causes of action sounding in tort. However, Ford has not contested the district court's implicit conclusion that all of his causes of action were based on MHMC's alleged breach of its implied covenant.

Liberally construed, Ford's complaint could be interpreted to allege that, even if MHMC had no duty to allow Ford to rebuild, it breached its implied covenant of good faith and fair dealing by failing to promptly respond in any manner to Ford's requests to rebuild. However, because Ford has not argued on appeal that MHMC breached its implied covenant by failing to promptly respond, we do not address the issue.

MHMC moved for summary judgment and argued that, regardless of the actual value of the property, MHMC's security has been impaired by Ford's default and lack of creditworthiness. On February 13, 1986, the district court entered summary judgment in favor of MHMC. In view of Ford's "continuing and repeated defaults in making payments due [on his note], ... and [Ford's] demonstrated inability or unwillingness, or both, to keep [his] loan obligations current," the court concluded that MHMC has no duty to permit Ford to use the insurance proceeds to rebuild:

If MHMC had permitted the insurance proceeds to be used for reconstruction, it would have had to part with the security of the cash payment already on hand, and would have had to defer indefinitely, until construction was completed, its right to foreclose on the security of the real property, both of which changes in its position would have constituted an impairment of its security as a matter of law. No evidence or findings as to the value of the subject real property are necessary to support this conclusion.

On this appeal, Ford contends that the district court erred in concluding as a matter of law that MHMC's security is impaired because Ford is in default. Ford argues that, under California law, the issue of impairment is " 'a question of fact to be determined in light of the particular circumstances of each case after a consideration of all of the relevant facts [sic].' " *Kreshek v. Sperling*, 157 Cal.App.3d 279, 283, 204 Cal.Rptr. 30, 32 (1984) (quoting *People ex rel. Dep't of Transp. v. Redwood Baseline, Ltd.*, 84 Cal.App.3d 662, 670, 149 Cal.Rptr. 11, 16 (1978)). Ford concedes that his default and poor credit history are relevant, but submits that the district court was wrong in its conclusion that the issue of impairment can be determined without considering the actual value of the property.

*1523 ISSUE PRESENTED

I. Whether the district court erred in concluding that, regardless of the actual value of the property, MHMC has no duty to permit Ford to use fire insurance proceeds to rebuild because Ford is in complete default on his note and MHMC is entitled to foreclose on the property at any time.

STANDARD OF REVIEW

[1][2][3] The district court's entry of summary judgment is reviewed de novo. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir.1986). The district court's interpretation of state law is also subject to de novo review. *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir.1984) (en banc). We may affirm on any basis in the record. *DeNardo v. Murphy*, 781 F.2d 1345, 1347 (9th Cir.), *cert. denied*,--- U.S. ----, 106 S.Ct. 1962, 90 L.Ed.2d 648 (1986); *Considine v. United States*, 683 F.2d 1285, 1288 n. 4 (9th Cir.1982).

ANALYSIS

[4] In *Schoolcraft v. Ross*, 81 Cal.App.3d 75, 146 Cal.Rptr. 57 (1978), the trust deed at issue contained the same type of fire insurance clause as in

MHMC were deprived indefinitely of its right to foreclose so that Ford could rebuild his residence.

The reasoning of the *Milstein-Schoolcraft-Kreshek* line of cases does not support Ford's contention that he was entitled to rebuild. Here, it is the trustor Ford who has failed "to do everything that the contract presupposes [he] will do to accomplish its purpose." *Schoolcraft,* 81 Cal.App.3d at 80, 146 Cal.Rptr. at 59. Since Ford has been "unwilling or unable to continue making payments on the property,"*id.* at 80, 146 Cal.Rptr. at 60, he is the party who has frustrated "[t]he purpose of the note and deed of trust,"*Milstein,* 27 Cal.App.3d at 487, 103 Cal.Rptr. at 18. Owing to the accumulation of unpaid interest, Ford's debt significantly exceeds the balance of the original principal, and MHMC's application of the insurance proceeds to Ford's overdue note will not result in MHMC's "accelerat[ing] payment on this note." *Kreshek,* 157 Cal.App.3d at 283, 204 Cal.Rptr. at 32.

Schoolcraft was concerned with the trust deed beneficiary's use of a fortuitous fire to accelerate the trustor's loan. In this case, it is the trustor who is attempting to use a fire to deprive the trust deed beneficiary of its right to sell the property to cover the trustor's long overdue loan. The district court correctly concluded that MHMC's security would be impaired if it were required to defer foreclosure indefinitely while Ford rebuilds his residence. Since MHMC is entitled to foreclose at any time, construing the insurance clause so as to allow Ford to rebuild would defeat the "property rights contemplated by the parties" when the trust deed was executed. *Schoolcraft,* 81 Cal.App.3d at 81, 146 Cal.Rptr. at 60.FN4

FN4. The district court also concluded that MHMC's security would be impaired because MHMC "would have had to part with the security of the cash payment already on hand" if it were required to let Ford rebuild. It appears to us, however, that MHMC's "part[ing] with the cash payment already on hand" cannot be the type of impairment contemplated by *Schoolcraft.* Such reasoning assumes away the problem, for the very issue is to determine under what circumstances a beneficiary must part with insurance proceeds so that the trustor can rebuild. If parting with the proceeds constitutes impairment, trustors could never rebuild.

[5][6][7] Moreover, California observes "the traditional rule that a covenant of good faith and fair dealing will not be implied to vary the express unambiguous terms of a contract." *Milstein,* 27 Cal.App.3d at 487, 103 Cal.Rptr. at 19; *see also April Enters., Inc. v. KTTV,* 147 Cal.App.3d 805, 816, 195 Cal.Rptr. 421, 425 (1983). Under the express terms of the note and deed of trust, Ford is in default and MHMC has the right to sell the property at any time. Since reliance on the implied covenant would significantly prejudice MHMC's express contractual rights under the trust deed, the covenant should not be implied to permit Ford to rebuild.

The district court concluded that MHMC's security was impaired as a matter of law because MHMC's legal right to foreclose would be frustrated if it had to defer its trustee's sale indefinitely while Ford rebuilds his residence. Ford argues that the issue of impairment can never be one of law and always requires the court to consider evidence of the property's actual value. He cites *Kreshek,* 157 Cal.App.3d at 283, 204 Cal.Rptr. at 32, for the proposition that whether a lender's security is impaired is a question of fact. We note, however, that the case *Kreshek* relies upon also characterizes the issue as "*normally* a question of fact." *1525*Redwood Baseline,* 84 Cal.App.3d at 688, 149 Cal.Rptr. at 28 (emphasis added). When the trustor's loan is in good standing, the issue of impairment will normally involve a factual inquiry into whether the market value of the trust deed property still adequately secures the trustor's indebtedness. This is because the purpose of a deed of trust is to provide the beneficiary with recourse to sufficient collateral upon the trustor's default. In this case, however, regardless of the value of Ford's property, the purpose of the deed of trust would be defeated if Ford were allowed to rely on the fire in effect to cure his longstanding default and to deprive MHMC of its contractual right to foreclose on the property at any time. Thus, we agree with the district court that it was unnecessary in this case to consider evidence of the actual value of Ford's property. That value is irrelevant to the impairment claimed by MHMC.

Assuming arguendo that the issue of impairment is always one of fact, we would nonetheless affirm the district court's judgment. There are no disputed issues of fact relevant to MHMC's claim that its security would be impaired if it were deprived of its right to foreclose immediately. On the record before us, a factual finding that MHMC's security was not impaired would be clearly erroneous. *See*Fed.R.Civ.P. 52(a).

CONCLUSION

Ford is in long-standing default on his promissory note, and by the express terms of the trust deed, MHMC is entitled to foreclose on Ford's property immediately. If MHMC were required by its implied covenant to defer foreclosure indefinitely so that Ford can rebuild, its express contractual rights would be impaired. Thus, we affirm the district court's holding on summary judgment that *Schoolcraft v. Ross* does not require MHMC to let Ford rebuild.

AFFIRMED.

C.A.9 (Cal.),1987.
Ford v. Manufacturers Hanover Mortg. Corp.
831 F.2d 1520

END OF DOCUMENT

C
Hart v. Prudential Property and Cas. Ins. Co.
D.Nev.,1994.

United States District Court,D. Nevada.
Mary S. HART, individually and as Guardian Ad Litem for Stephen G. Hart, a minor, Plaintiff,
v.
PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY and Does 1 through 10, inclusive, Defendants.
No. CV-S-93-307-PMP (RJJ).

April 12, 1994.

Insured under automobile policy brought bad faith action against insurer, alleging wrongful denial of certain medical payments benefits. On cross-motions for summary judgment, the District Court, Pro, J., held that violations of Nevada Unfair Insurance Practices Act are not per se bad faith, and do not obviate need to prove bad faith in traditional manner by submitting question of reasonableness to trier of fact.

Motions denied.

West Headnotes

[1] Federal Courts 170B ⚷373

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(A) In General
170Bk373 k. Substance or Procedure; Determinativeness. Most Cited Cases
Federal court sitting in diversity must apply substantive law of state in which it sits.

[2] Federal Courts 170B ⚷390

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision
170Bk390 k. Anticipating or Predicting State Decision. Most Cited Cases
In absence of controlling state law, federal court sitting in diversity must use its own best judgment in predicting how state Supreme Court would decide substantive issue.

[3] Judgment 228 ⚷181(23)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(23) k. Insurance Cases. Most Cited Cases
In Nevada, summary judgment is appropriate in insurance bad faith cases only when there is no material question of fact as to reasonableness of insurer's conduct.

[4] Insurance 217 ⚷3419

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3416 Of Insurers
217k3419 k. Bad Faith in General. Most Cited Cases
(Formerly 217k602.5)
Tort of insurer's bad faith is not creature of statute in Nevada; it reflects duty running between insurer and insured judicially created by case law.

[5] Insurance 217 ⚷3419

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3416 Of Insurers
217k3419 k. Bad Faith in General. Most Cited Cases
(Formerly 217k602.5)
Nevada Unfair Insurance Practices Act was not intended to codify common-law tort of bad faith; though statute and common law may overlap to

limited extent, statute reaches different conduct than that which is contemplated by common-law tort. N.R.S. 686A.310.

[6] Insurance 217 ⚷3419

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3416 Of Insurers
217k3419 k. Bad Faith in General. Most Cited Cases
(Formerly 217k602.12(2))

Insurance 217 ⚷3427

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3427 k. Questions of Law or Fact. Most Cited Cases
(Formerly 217k602.12(2))

Violations of Nevada Unfair Insurance Practices Act are not per se bad faith, and do not obviate need to prove bad faith in traditional manner by submitting question of reasonableness to trier of fact. N.R.S. 686A.310.

[7] Federal Civil Procedure 170A ⚷2501

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 k. Insurance Cases. Most Cited Cases

Issue of material fact as to whether automobile insurer's refusal to pay certain medical expenses was bad faith precluded summary judgment for insurer in suit by insured; despite medical evidence that insured's problems might not be related to accident, it was for jury to determine whether insurer's conduct was reasonable.

***901** Ian Christopherson, Christopherson Law Offices, Las Vegas, NV, for plaintiff.
Robert D. Vannah, Vannah & Costello, Las Vegas, NV, for defendant.

ORDER

PRO, District Judge.

Before the Court are cross-Motions for Summary Judgment on Plaintiff's cause of action for bad faith. Plaintiff Mary S. Hart filed her Motion for Summary Judgment (# 33) on January 14, 1994. Defendant Prudential Property and Casualty Insurance Company ("Prudential") filed its Motion for Summary Judgment (# 34) on January 18, 1994. Prudential filed an Opposition (# 35) to Plaintiff's Motion for Summary Judgment on January 24, 1994, and Plaintiff filed a Reply (# 36) on February 3, 1994. Also on February 3, 1994, Plaintiff filed an Opposition (# 37) to Prudential's Motion for Summary Judgment. Prudential did not file a Reply.

I. *Facts*

This case arises from an automobile accident involving Stephen Hart, the minor son of Plaintiff Mary Hart. On March 26, 1992, Stephen was a passenger on a school bus when the bus was hit by another vehicle. On the day of the accident, Stephen was seen at the University Medical Center Quick Care Facility where he complained of pain in his right side abdomen and ribs and pain in his upper back and neck. He also vomited three or four times after the accident.

At the time of the accident, Stephen's mother, Plaintiff Mary Hart, carried a policy of insurance through Defendant Prudential which provides for up to $50,000 in coverage for medical payments. Pursuant to this policy, Plaintiff filed a claim with Prudential for the injuries allegedly suffered by her son as a result of the March 26, 1992 accident. Prudential has apparently refused to pay a number of the submitted medical bills on the grounds that not all of Stephen's injuries resulted from the automobile accident.

Plaintiff's Complaint was removed to this Court from the Eighth Judicial District Court of the State of Nevada on the basis of diversity. Plaintiff seeks monetary damages on various theories of recovery. Plaintiff's Second Cause of Action, the subject of the present series of motions, seeks damages for Prudential's breach of the implied covenant of good faith and fair dealing, i.e., common law bad faith.

II. *DISCUSSION*

While arguing for summary judgment in her favor, Plaintiff has raised an interesting question regarding the interrelationship between the common law tort of bad faith as it has been recognized in Nevada and the Nevada Unfair Insurance Practices Act (N.R.S. 686A.010 et seq.). This question must be resolved before turning to the issue of whether summary judgement on Plaintiff's bad faith claim is appropriate.

[1][2] As an initial matter, since this Court's jurisdiction is invoked upon diversity of citizenship, a federal court is bound to apply the substantive law of the state in which it sits. *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Strassberg v. New England Mutual Life Ins. Co.,* 575 F.2d 1262 (9th Cir.1978). Thus, Nevada law controls. However, in the absence of controlling Nevada law, this Court must use its own best judgment in predicting how the Nevada Supreme Court would decide the substantive issue. *See Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1482 (1986), *modified,*810 F.2d 1517 (9th Cir.1987); *Takahashi v. Loomis Armored Car Service,* 625 F.2d 314, 316 (9th Cir.1980). In performing that function, the Court may be aided by reviewing well-reasoned decisions from other jurisdictions. *Takahashi,* 625 F.2d at 316.

Plaintiff's argument, apparently taken from a local treatise,[FN1] contends that the status of Nevada law in the area of insurance bad faith has evolved such that a single *902 violation of the Nevada Unfair Insurance Practices Act ("the Act") will constitute per se bad faith. If Plaintiff's contention is correct, a single violation of the act will constitute bad faith, thus obviating the need to prove bad faith in the traditional manner by submitting the question of reasonableness to the trier of fact. An evaluation of Plaintiff's argument must begin by tracing the history of the tort of bad faith in Nevada.

FN1. *See* J. Mitchell Cobeaga et al., *Nevada Bad Faith Law and Practice* (1990).

A. *Common Law Bad Faith in Nevada*

The seminal case in Nevada in the area of insurance bad faith is *United States Fidelity & Guaranty Co. v. Peterson,* 91 Nev. 617, 540 P.2d 1070 (1975). In that case the Nevada Supreme Court first recognized the existence of a cause of action for an insurer's tortious breach of the implied covenant of good faith and fair dealing. *Peterson* involved a claim made by the insurer's own insured, i.e., a "first party" claim.[FN2] In recognizing the new tort, the Nevada Supreme Court stated:

FN2. A "first party" claim involves a claim made on an insurance policy by the insurer's own insured. In contrast, a claim made on the insurance policy by another against the insured is termed a "third party" claim.

> We approve and adopt the rule that allows recovery of consequential damages where there has been a showing of bad faith by the insurer. Where an insurer fails to deal fairly and in good faith with its insured by refusing without proper cause to compensate its insured for a loss covered by the policy such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. The duty violated arises not from the terms of the insurance contract but is a duty imposed by law, the violation of which is a tort.

540 P.2d at 1071 (citing *Silberg v. California Insurance Co.,* 11 Cal.3d 452, 113 Cal.Rptr. 711, 521 P.2d 1103 (1974); *Gruenberg v. Aetna Insurance Co.,* 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973)). The court thus found that the record supported a finding of bad faith where the insurer

acted unreasonably by refusing to negotiate or pay monies validly due under the insurance contract, where the insurer was aware of the precarious financial condition of its insured. *Id.*

In *American Excess Insurance Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 729 P.2d 1352 (1986), the Nevada Supreme Court cited its holding in *Peterson* with approval when it noted that "[b]ad faith involves an actual or implied awareness of the absence of a reasonable basis for denying the benefits of the policy." *Id.* at 1354. The court went on to hold that where the insurance company's interpretation of the contract was reasonable, there can be no basis for concluding that the insurance company acted in bad faith. *Id.*

More recently, in *Pemberton v. Farmers Insurance Exchange*, 109 Nev. 789, 858 P.2d 380 (1993), the Nevada Supreme Court, again relying on *Peterson*, stated that "[a]n insurer fails to act in good faith when it refuses 'without proper cause' to compensate the insured for a loss covered by the policy." 858 P.2d at 381 (citing *Peterson*, 540 P.2d 1070; *accord Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866, 868 (1981); *Davy v. Public National Ins. Co.*, 181 Cal.App.2d 387, 5 Cal.Rptr. 488 (4th Dist.1960)).

[3] Moreover, the court has clarified that "a jury question on [an] insurer's bad faith arises when relevant facts are in dispute or when facts permit differing inferences as to the reasonableness of [an] insurer's conduct." *United Fire Insurance Co. v. McClelland*, 105 Nev. 504, 780 P.2d 193, 197 (1989) (citation omitted). Thus, in Nevada, summary judgment is appropriate in insurance bad faith cases only when there is no material question of fact as to the reasonableness of the insurer's conduct.

B. *The Nevada Unfair Insurance Practices Act*

While the common law tort of bad faith denial of an insurance claim was developing in Nevada, the Nevada legislature was embarking on an effort to establish a comprehensive plan to regulate the activities of the insurance industry within the state. The result of this effort was Title 57, the Nevada Insurance Code, which, among other things, sets forth the duties and powers of the insurance commissioner, establishes an administrative*903 hearing procedure in the event there are violations of the Code, and provides a mechanism for appealing to the state courts. *See*N.R.S. § 679B et seq.

In 1975, N.R.S. § 686A.310 was added to the Nevada Insurance Code. As originally enacted, this section, patterned after the National Association of Insurance Commissioner's model legislation, designated certain activities which were considered to be unfair practices in settling insurance claims when they were engaged in "with such frequency as to indicate a general business practice." *See* NAIC Model Unfair Trade Practices Act § 4(9)(f). This new provision, however, did not expressly create a private cause of action for an individual injured as a result of an insurer engaging in any of the proscribed activities.

The federal district court, in *Tweet v. Webster*, 614 F.Supp. 1190 (D.Nev.1985), had occasion to determine whether § 686A.310 granted a third-party claimant a direct cause of action against a tortfeasor's insurer for a bad faith refusal to settle a reasonably clear claim.[FN3] The court found that under Nevada law, no such cause of action against existed on behalf of a third-party claimant that could be "based on statute, implied contract, or common law tort." *Id.* at 1195.

FN3. The plaintiff in *Tweet* based his cause of action in part on what at that time was subdivision (5), which is now subdivision (e), of § 686A.310 which defines one unfair settlement practice as:

> (5) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.

After the decision in *Tweet,* in 1987, the Nevada legislature amended § 686A.310. The legislature considered and passed A.B. 811 which, among other things, added subsection 2 to § 686A.310 and provided:

2. In addition to any rights or remedies available to the commissioner, an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

A.B. 811 also eliminated the language which required that violations of § 686A.310 required a showing of a "general business practice." Thus, an insurer would be in violation of the statute for engaging in a single enumerated unfair act.

The newly-enacted subsection 2 formed the basis, in part, of the federal court's decision in *Crystal Bay General Imp. Dist. v. Aetna Cas. & Sur.*, 713 F.Supp. 1371 (D.Nev.1989), which found that the pre-1987 version of § 686A.310 permits implication of a private right of action by an a first-party claimant, i.e., the insured, against an insurer. *Id.* at 1376-1377. The court found that the implication of a private remedy from the pre-1987 act "is entirely consistent with the underlying purpose of the legislative scheme" as "was acknowledged by the amendments made by the 1987 legislature." *Id.* at 1377.

Plaintiff argues that Nevada law in this area has evolved such that the only conclusion that can be reached regarding the interrelationship between N.R.S. § 686A.310 and common law bad faith is that "one act in violation of N.R.S. [§] 686A.310 is sufficient to establish bad faith on the part of the insurance carrier." Plaintiff's Motion for Summary Judgment (# 33) at 9.

C. *Plaintiff's Motion for Summary Judgment*

While it is clear that a private right of action exists under § 686A.310, Plaintiff did not plead such a violation in her Complaint. Plaintiff instead has chosen to plead that Defendant committed the common law tort of breach of the implied covenant of good faith and fair dealing. Plaintiff now argues that she may rely upon a violation of the statute to demonstrate common law bad faith. Thus, the question becomes whether it was the intent of the Nevada legislature to codify the common law tort of bad faith when it amended § 686A.310 in 1987? For the reasons set forth below, the Court finds that the Nevada legislature did not so intend.

Plaintiff, citing *Tweet v. Webster,* 614 F.Supp. 1190 (D.Nev.1985), begins her argument with the premise that "the duty of good faith and fair dealing in Nevada is imposed by statute; namely N.R.S. 686A.310." Plaintiff's Motion for Summary Judgment (# 33) at 6. Plaintiff then cites *904*Crystal Bay General Imp. Dist. v. Aetna Cas. & Sur.*, 713 F.Supp. 1371 (D.Nev.1989), and its recognition that § 686A.310 permits implication of a private right of action by an insured against an insurer. Thus, Plaintiff argues, since Nevada recognizes the doctrine of negligence per se, citing *Southern Pacific Co. v. Watkins,* 83 Nev. 471, 435 P.2d 498 (1968) and *Barnes v. Delta Lines, Inc.*, 99 Nev. 688, 669 P.2d 709 (1983), "a violation of N.R.S. [§] 686A.310 would constitute negligence per se, thus obviating the burden of proving actual bad faith." Plaintiff's Motion for Summary Judgment (# 33) at 6.

[4] The first flaw in Plaintiff's argument is the assertion that *Tweet* held that the duty of good faith and fair dealing in Nevada is imposed by statute. This is simply incorrect. As already noted, the issue in *Tweet* was whether a third-party claimant had a private cause of action under § 686A.310. Nowhere in the court's decision is it implied that the duty to act in good faith arises from statute. In fact, in *Peterson, supra,* the Nevada Supreme Court never mentions the Nevada Unfair Insurance Practices Statute, and explicitly states that the duty is one "imposed by law." 540 P.2d at 1071. The tort of bad faith in Nevada is not a creature of statute. It reflects a duty running between the insurer and the

insured judicially created by case law. This fact is not fatal to Plaintiff's argument, but it does demonstrate that the nexus between common law bad faith and the act is more tenuous than Plaintiff would have the Court hold.

Perhaps Plaintiff's most compelling assertion is that by amending § 686A.310 in 1987 to provide that insureds may recover for damages sustained as a result of an unfair practice, the Nevada legislature, while fully aware of the existence of the common law tort of bad faith, intended to codify certain activities that were per se bad faith. This argument, at first glance, appears logically appealing considering the evolution of the law in relation to the enumerated practices. However, upon closer scrutiny it becomes clear that such is not the case.

Peterson made clear that bad faith may occur "where an insurer fails to deal fairly and in good faith with its insured *by refusing without proper cause to compensate its insured for a loss covered by the policy.* " 540 P.2d at 1071 (citations omitted) (emphasis added). Nearly all of the cases decided since *Peterson* restated the standard in virtually the same way. *See Pemberton,* 858 P.2d at 381 ("An insurer fails to act in good faith when it refuses 'without proper cause' to compensate the insured for a loss covered by the policy"); *Falline v. Golden Nugget Hotel & Casino,* 107 Nev. 1004, 823 P.2d 888, 891 (1991) ("Bad faith, the converse of good faith, has been defined as 'the absence of a reasonable basis for denying benefits ... and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim."); *American Excess,* 729 P.2d at 1354 ("Bad faith involves an actual or implied awareness of the absence of a reasonable basis for denying the benefits of the policy.") Thus, it appears that the focus of common law bad faith, and indeed the conduct for which liability is imposed, was on an unreasonable *denial* of the benefits of the policy.

In contrast, the Nevada Unfair Practices Act focuses upon different conduct than does the common law tort of bad faith. The statute proscribes specific actions taken by an insurer which Nevada has deemed to be unfair whether or not they are related to a denial of insurance benefits. For example, subdivision (i) states that an insurer engages in a unfair practice by "[f]ailing, *upon payment of a claim,* to inform insureds or beneficiaries of the coverage under which payment is made." N.R.S. § 686A.310(1)(i) (emphasis added). Were this Court to adopt Plaintiff's contention that a violation of the statute is per se bad faith, an insurer would be liable for bad faith even where it promptly paid a claim but may have inadvertently failed to inform its insured of the coverage under which payment was made. Such a situation may give rise to a private cause of action for damages incurred as a result of the statutory violation, but it certainly does not constitute common law bad faith.

[5][6] Therefore, the Court it unpersuaded that the intent of the Nevada legislature in enacting the Nevada Unfair Insurance Practices Act was codify of the common law tort of bad faith. While the statute and the *905 common law may overlap to a limited extent,[FN4] the statute reaches different conduct than that which is contemplated by the common law tort. Accordingly, as Plaintiff has alleged the common law bad faith tort, this Court applies the *Peterson* standard to the respective Motions for Summary Judgment.[FN5]

FN4. For example, it is a violation of the statute where the insurer fails "to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies." N.R.S. § 686A.310(1)(c). Similarly, it has been held that "[a]n insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691, 620 P.2d 141, 145-46 (1979), *cert. denied,*445 U.S. 912, 100 S.Ct. 1271, 63 L.Ed.2d 597 (1980). While it appears that both the statute and the common law mandate an investigation by the insurer, the crucial difference is that a failure to investigate is a violation of the statute giving rise to appropriate damages, where under the common law, a failure to investigate merely impacts the reasonableness of the denial.

FN5. The Court does not expect the ramifications of its decision on this issue to be far reaching. If the conduct of the insurer implicates a violation of § 686A.310, a plaintiff need only plead a violation of the statute to recover damages pursuant to the private right of action. What cannot be done, however, as was attempted here, is to prove common law bad faith simply by alleging a violation of the statute. As a practical matter, the effect of the Court's decision is to force plaintiffs in insurance bad faith cases to plead the statute if they intend to rely upon it.

Therefore, as a result of the Court's findings, Plaintiff's Motion for Summary Judgment is easily resolved. As that Motion relies exclusively on purported violations of § 686A.310 to argue per se bad faith, and because the Court has already determined that this argument is without merit, Plaintiff's Motion must be denied.

D. *Prudential's Motion for Summary Judgment*

[7] Prudential's Motion for Summary Judgment presents little by way of legal argument. Instead, Prudential argues that as a matter of law, there can be no bad faith because Prudential based its denial "of medical payments benefits on the independent medical examinations of two highly qualified physicians, the deposition testimony of both Plaintiffs, as well as the deposition testimony of Stephen Hart's treating physicians, of whom several indicated that Stephen Hart's problems may not be related to the 3/26/92 automobile accident." Defendant's Motion for Summary Judgment (# 34) at 17.

However, as *McClelland* points out, "a jury question on [an] insurer's bad faith arises when relevant facts are in dispute or when facts permit differing inferences as to the reasonableness of [an] insurer's conduct." 780 P.2d at 197 (citation omitted). At this time, from the evidence presently contained in the record, the Court cannot say, as a matter of law, that the only inference that can be drawn is that Prudential's conduct was reasonable. Therefore, Prudential's Motion for Summary Judgment must also be denied.

IT IS THEREFORE ORDERED THAT Plaintiff's Motion for Summary Judgment or Partial Summary Judgment (# 33) is Denied.

IT IS FURTHER ORDERED THAT Defendant's Motion for Partial Summary Judgment (# 34) is Denied

D.Nev.,1994.
Hart v. Prudential Property and Cas. Ins. Co.
848 F.Supp. 900

END OF DOCUMENT

EXHIBIT 3

LEXSEE 1997 US DIST LEXIS 12670

Hillel Nachum and Mindy Wechsler, Plaintiffs, vs. Allstate Insurance Company, Defendants.

CASE NO.: CV 97-4493 ABC (BQRx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

1997 U.S. Dist. LEXIS 12670

July 21, 1997, Decided
July 21, 1997, Filed; July 22, 1997, Entered

DISPOSITION: [*1] Defendant's motion to Dismiss GRANTED IN PART and DENIED IN PART.

COUNSEL: For HILLEL NACHUM, MINDY WECHSLER, plaintiffs: Kenneth L Perkins, Jr, Perkins Zarian & Duncan, Irvine, CA.

For ALLSTATE INSURANCE CO, defendant: Ronald D Getchey, Peter H Klee, Luce Forward Hamilton & Scripps, San Diego, CA.

JUDGES: AUDREY B. COLLINS, UNITED STATES DISTRICT JUDGE.

OPINION BY: AUDREY B. COLLINS

OPINION

ORDER RE: Defendant's Motions to Dismiss Portions of Plaintiffs' Complaint

Defendant's Motion to Dismiss came on regularly for hearing before this Court on July 21, 1997. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that Defendant's Motion is GRANTED IN PART and DENIED IN PART.

I. Procedural Background

On May 29, 1997, Plaintiffs HILLEL NACHUM and MINDY WECHSLER, as Trustees of the NACHUM AND WECHSLER FAMILY TRUST DATED FEBRUARY 18, 1993 ("Plaintiffs"), filed a Complaint in the Superior Court of the State of California, County of Los Angeles, against Defendant ALLSTATE INSURANCE COMPANY ("Defendant" or "Allstate"). Plaintiffs' Complaint alleges causes of action for: (1) Breach of the Implied Covenant of Good Faith and Fair Dealing; [*2] (2) Breach of Written Contract; (3) Negligence; (4) Unfair Business Practices (Cal. Bus. & Prof. Code § 17200 *et seq.*; and (5) Declaratory Relief.

On June 19, 1997, Defendant removed Plaintiffs' action to this Court. On June 23, 1997, Defendant filed the instant Motion to Dismiss portions of Plaintiffs' Complaint pursuant to Rule 12(b)(6). Plaintiffs filed an Opposition on July 7, 1997, and Defendant filed its Reply on July 14, 1997.

II. Plaintiff's Allegations

On January 17, 1994, a large earthquake struck Los Angeles and the surrounding area (the "Northridge earthquake"). [Compl. P 24]. At the time of the Northridge earthquake, Plaintiffs owned two residential properties located at 435 and 454 North Sweetzer Avenue in Los Angeles, California. [Compl. P 14]. Plaintiffs' properties were not insured against earthquake damages at the time of the Northridge earthquake. [Compl. P 23].

In February 1994, Charles Hillman ("Hillman"), an Allstate sales agent, contacted Plaintiffs to determine whether they were interested in purchasing earthquake coverage for their properties. [Compl. P 25]. Plaintiffs indicated that they were interested in such coverage. [Id.]. Shortly [*3] thereafter, Hillman inspected Plaintiffs' properties and determined that they had not been damaged in the Northridge earthquake. [Compl. P 26]. Sometime prior to March 20, 1994, Allstate issued written insurance policies covering Plaintiffs' properties, providing coverage for, *inter alia*, earthquake damages. [Compl. P 27].

On March 20, 1994, a major aftershock of the Northridge earthquake struck the Los Angeles area.

[Compl. P 31]. Plaintiffs' properties were severely damaged. [Id.].

In April 1994, Plaintiffs submitted a claim to Allstate for damages to their properties resulting from the March 20, 1994 aftershock. [Compl. P 32]. Shortly thereafter, Allstate Claims Adjuster Jim Kovar ("Kovar") conducted a cursory walk-through examination of the properties to inspect the damage. [Compl. P 35]. Kovar quickly concluded his inadequate investigation and grossly underestimated the claim for damage at 435 North Sweetzer at $ 44,213.66 and the claim for damage at 454 North Sweetzer at $ 59,491.37. [Id.].

After Kovar's inspection of the property, he retained International Design Plus ("IDP"), a structural engineering firm, to inspect the properties to determine the structural [*4] and foundational integrity of the properties. [Compl. P 36]. IDP determined that both properties had suffered some structural damage, but were structurally stable. [Id.]. IDP reached no conclusion as to whether the observed structural damage was caused by the Northridge earthquake or the March 20, 1994 aftershock. [Compl. P 37].

On April 24, 1994, after consideration of the IDP report, and after applying the deductible under the policies, Allstate issued a check for $ 21,813.66 for the property damage to 435 North Sweetzer and a check for $ 30,991.37 for the property damage to 454 North Sweetzer. [Compl. P 37]. Allstate has made no other payments to Plaintiffs for property damage. [Id.].

Allstate did virtually nothing to ascertain the full extent of damages to the properties until January 7, 1995. [Compl. P 38]. At that time, Kovar retained the structural engineering firm of Helou Structural Design ("Helou") to conduct a follow-up inspection of 435 North Sweetzer. [Id.]. Helou prepared a report that reached no conclusion as to whether the observed structural damage to 435 North Sweetzer was caused by the Northridge earthquake or the March 20, 1994 aftershock. [Id.].

[*5] In February 1995, Plaintiffs obtained their own estimates for costs of repair to the property. [Compl. P 40]. The estimated cost of repair to the property at 435 North Sweetzer was approximately $ 178,575.11. [Id.]. The repair estimate for 454 North Sweetzer was approximately $ 166,442.79. [Id.]. Plaintiffs submitted these cost of repair estimates to Allstate, and Allstate took no action upon them.

On September 13, 1995, Allstate Claims Adjuster Don Holland, Jr. ("Holland") retained Earthquake Engineering, Inc. ("EEI") to determine the extent of the structural damage sustained at 454 North Sweetzer and to make repair recommendations. [Compl. P 41]. In contradiction to the earlier reports prepared by IDP and Helou, EEI allegedly determined that all of the earthquake damage to both properties was caused by the Northridge earthquake and *not* by the aftershock. [Id.].

Based on the EEI report for 454 North Sweetzer, Allstate sent a letter to Plaintiffs on October 10, 1995 stating that Plaintiffs' claim for 454 North Sweetzer was not covered by the policy because the damage to the property was not caused by the March 20, 1994 aftershock, but rather by the Northridge earthquake, [*6] as well as by construction defects, preexisting damage, long-term settlement, poor drainage, surface and subsurface water, "wear and tear," and "inherent vice." [Compl. P 42]. On December 4, 1995, EEI inspected 435 North Sweetzer and reached conclusions identical to those reached at 454 North Sweetzer. [Compl. P 43]. On January 6, 1996, Allstate denied coverage for Plaintiffs' claim regarding the 454 North Sweetzer. [Id.].

III. Discussion

A. Motion to Dismiss for Failure to State a Claim

1. Standard

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

A court must accept as true all material allegations in the [*7] complaint, as well as reasonable inferences to be drawn from them. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *see also Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980) (finding that the complaint must be read in the light most favorable to the plaintiff). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031, 70 L. Ed. 2d 474, 102 S. Ct. 567 (1981); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961, 23 L. Ed. 2d 748, 89 S. Ct. 2096 (1969).

Furthermore, unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991), *overruled on other grounds by Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., et al.*, 511 U.S. 164, 114 S. Ct. [*8] 1439, 128 L. Ed. 2d 119 (1994). A court may, however, consider exhibits submitted with the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986), *abrogated on other grounds by Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104, 115 L. Ed. 2d 96, 111 S. Ct. 2166 (1991).

Lastly, a Rule 12(b)(6) motion "will not be granted merely because [a] plaintiff requests a remedy to which he or she is not entitled." Schwarzer, et al., *Civil Procedure Before Trial* § 9:230. "It need not appear that plaintiff can obtain the *specific* relief demanded as long as the court can ascertain from the face of the complaint that *some* relief can be granted." *Doe v. United States Dept. of Justice.*, 243 U.S. App. D.C. 354, 753 F.2d 1092, 1104 (D.C. Cir. 1985); *see also Doss v. South Central Bell Telephone Co.*, 834 F.2d 421, 425 (5th Cir. 1987) (demand for improper remedy not fatal if claim shows plaintiff entitled to different form of relief).

2. Analysis

[*9] In the instant motion, Defendant contends that:

(a) Plaintiffs' third cause of action for negligence is barred as a matter of law;

(b) Plaintiffs' request for restitution on behalf of non-parties (within Plaintiffs' fourth cause of action) is barred as a matter of law;

(c) Plaintiffs' request for injunctive relief (within Plaintiffs' fourth cause of action) fails as a matter of law;

(d) Plaintiffs' fifth cause of action for declaratory relief is barred as a matter of law; and

(e) Plaintiffs fail to plead facts sufficient to support a claim for punitive damages on their first cause of action.

The Court will address each issue in turn.

a. Plaintiffs' Third Cause of Action for Negligence

Defendant generally asserts that, under California law, an insurer cannot be held liable for mere negligent conduct in dealing with its insured. The Court disagrees with the generality of this assertion.

It is well-settled that an insurer cannot be held liable for breach of the implied covenant of good faith and fair dealing (bad faith) based on mere negligent conduct in handling the claim(s) of its insured. *See Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1166 [*10] (9th Cir. 1996) (In California, mere negligence in claims handling is not enough to constitute unreasonable conduct for the purpose of establishing bad faith); *National Life & Accident Ins. Co. v. Edwards*, 119 Cal. App. 3d 326, 339, 174 Cal. Rptr. 31 (1981) (same).

However, an insured may sue an insurer for negligence in certain matters not related to the handling of an actual claim. For example, in *Desai v. Farmers Ins. Exchange*, 47 Cal. App. 4th 1110 (1996), the court held that an insured can sue an insurer for the negligence of its agent, who negligently represented that the policy at issue provided the 100% replacement cost coverage that the insured demanded from his insurer before purchasing the policy. *Id.* at 1118-21; *see also Paper Savers, Inc. v. Nacsa*, 51 Cal. App. 4th 1090, 59 Cal. Rptr. 2d 547, 550-56 (1996) (insured can sue insurer for misfeasance or nonfeasance of agent in certain circumstances).

In this action, Plaintiffs argue that they should be able to maintain their action for negligence against Allstate based on the conduct of Allstate agent Charles Hillman. [Opp. at p. 8]. Plaintiffs allege that Hillman contacted Plaintiff Nachum after the Northridge [*11] earthquake and inquired whether Nachum was interested in obtaining earthquake coverage. After Nachum indicated that he was interested, Hillman conducted an inspection of Plaintiffs' properties and concluded that they were not damaged by the Northridge earthquake. He then recommended to Allstate that it underwrite and issue the insurance policies. Subsequently, after Plaintiffs submitted a claim for damage from the March 20, 1994 aftershock, Allstate took the position that Plaintiffs' property damage was caused by, *inter alia*, the Northridge earthquake. This position is contrary to the representations of Allstate agent Hillman. Plaintiffs assert that they are suing Allstate because its agent, Hillman, owed Plaintiffs a duty of care to properly inspect the property and procure the insurance Plaintiffs wanted, and breached that duty of care. [Opp. at p. 8]. Under California law, this theory of negligence states a viable claim for relief. *See Desai, supra; Paper Savers, supra.*

Although Plaintiffs' theory is well-articulated in their Opposition, it is not adequately pled in their Complaint. Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires "a short and plain [*12] statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). If Plaintiffs' theory of negligence is within the Complaint at all, it is buried amongst allegations that clearly fail as a matter of law. [*See* Compl. PP 61-63 (in part alleging negligence of "claims adjusters [and] claims representatives" in their investigation, adjustment, and settlement of Plaintiffs' claims). In the opinion of this Court, Plaintiffs' third cause of action does not constitute a "short and plain statement" of the viable theory of negligence stated in Plaintiffs' Opposition brief. Therefore, to the extent that the third cause of action is intended to state a claim for negligence based on the conduct of Hillman before the submission of Plaintiffs' claim, it is DISMISSED WITH LEAVE TO AMEND. Plaintiffs' amendment should incorporate a "short and plain statement" of this theory of negligence. To the extent that the third cause of action is intended to state a claim for negligence in the handling of Plaintiffs' claim, it is DISMISSED WITH PREJUDICE. Plaintiffs' amendment to the third cause of action should [*13] omit any references to negligent claims handling, which is not actionable in California under a negligence theory.

b. Plaintiffs' Request for Restitution on Behalf of Non-Parties (Fourth Cause of Action)

In Plaintiffs' fourth cause of action, they allege that Defendant has violated Cal. Bus. & Prof. Code § 17200 *et seq.* by committing unfair business practices. The "unfair business practices" that Plaintiffs complain of is simply the same conduct that gives rise to Plaintiffs' cause of action for bad faith in Allstate's handling of Plaintiffs' claims for property damage at 435 and 454 North Sweetzer. [*See* Compl. P 69(a) - (k)]. Despite the fact that Plaintiffs define Allstate's alleged "unfair business practices" solely in terms of the conduct alleged to have occurred in the bad faith handling of *Plaintiffs'* specific claims, Plaintiffs also attempt to bring an action "on behalf of the general public" and "many other insureds similarly situated" for restitution and disgorgement of profits. [Compl. PP 70-73].

The portions of the fourth cause of action that purport to seek restitutionary relief on behalf of non-parties fail to state a claim for two major reasons:

(1) [*14] the alleged "unfair business practices" pertain only to Allstate's handling of *Plaintiffs'* specific claims, and do not relate to non-parties;

(2) allowing the instant Plaintiffs to proceed "on behalf of the general public" for alleged bad faith conduct against non-parties would be inefficient and would raise due process concerns.

As noted above, Plaintiffs' allegations of "unfair business practices" are identical to those in their specific personal claim for bad faith in handling the claims for damage to 435 and 454 North Sweetzer. As such, the fourth cause of action simply does not allege any unfair business practices applicable to the "general public" or any other Allstate insured other than Plaintiffs. [1] Accordingly, the allegations in the Complaint are plainly inadequate to state a claim for unfair business practices committed against the "general public" or any non-party Allstate insured.

1 Presumably, the "general public" and other Allstate insureds were unaffected by Allstate's handling of the two claims for damage to Plaintiff's properties at 435 and 454 North Sweetzer.

[*15] In both cases cited by Plaintiffs in support of their alleged right to proceed on behalf of non-parties, the facts were clearly distinguishable from those in the instant case. In *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 259 Cal. Rptr. 789 (1989), the alleged unlawful practices of Dean Witter included assessing a $ 50 termination fee upon the closing of an IRA account. *Id.* at 762. This $ 50 fee was applicable to each person with a Dean Witter IRA account, and was not specifically limited to the individual plaintiff in the lawsuit. In the instant case, unlike *Dean Witter*, neither the vaguely alleged non-parties, nor the restitutionary amount to which they would be allegedly entitled, is readily identifiable from the Complaint.

The other case cited by Plaintiffs, *People v. Powers*, 2 Cal. App. 4th 330 (1992), is clearly inapposite to the instant one. In *Powers*, the San Francisco District Attorney, representing the People of California, brought an action for civil penalties and equitable relief against real estate developers under Cal. Bus. & Prof. Code § 17000 *et seq.* The District Attorney's complaint alleged that the developers had [*16] committed unlawful business practices when they violated San Francisco's Subdivision Code by reselling low-to-moderate-income condominium units at inflated prices. *Id.* at 336. On appeal, the *Powers* court allowed the District Attorney to seek "disgorgement of profits" from the illegal resale to be remitted to the state. *Powers* bears no resemblance to the instant case, and does not support Plaintiffs' alleged right to proceed on behalf of non-parties for conduct that relates only to the instant Plaintiffs.

Even if Plaintiffs could adequately allege "unlawful business practices" committed by Allstate against the general public or other Allstate insureds, they could not sue on behalf of these non-parties for the type of restitutionary relief sought in this case. In the fourth cause of action, Plaintiffs seek restitution (presumably refund of policy premiums) and disgorgement of profits obtained from allegedly unfair business practices. [Compl. P 73]. If adequately pled as to non-parties, these general "unfair business practices" would presumably be based on Allstate's bad faith handling of non-parties' claims for property damage caused by the March 20, 1994 aftershock. Therefore, [*17] in order for the instant Plaintiffs to proceed on behalf of non-parties, they would essentially have to litigate the individualized bad faith claims of each currently unidentified nonparty. Such a state of affairs would be highly impractical and would raise serious due process concerns.

The California Court of Appeals addressed this very issue in *Bronco Wine Company v. Frank A. Logoluso Farms*, 214 Cal. App. 3d 699, 262 Cal. Rptr. 899 (1989). In *Bronco Wine*, the defendant (Bronco Wine) underpaid the plaintiff and other grape growers in breach of contracts for sale of certain grape varietals. Plaintiff proceeded on behalf of itself and other non-party growers under Cal. Bus. & Prof. Code § 17203. *Id.* at 715. The types of conduct complained of on behalf of the over 100 non-party Bronco Wine growers included: wrongfully rejecting and refusing to accept grapes, adopting arbitrary quality standards, applying quality standards unreasonably in order to pay less for accepted grapes than the price agreed to by Bronco Wine, and threatening to sue and suing growers who complained of Bronco Wine's conduct. *Id.* The trial court entered a judgment containing restitution awards totaling [*18] $ 457,005, plus interest, to 27 growers who were not parties to the action. *Id.* at 704. The appellate court reversed the award of restitution to the non-parties. *Id.*

In reversing the award of restitution to non-parties, the *Bronco Wine* court noted:

> Rendering a judgment for or against a non-party to a lawsuit may constitute denial of due process under the United States and California Constitutions. . . . Due Process is denied because the non-joined party has not been given notice of the proceedings nor an opportunity to be heard. . . . Notice and a chance to be heard are essential components to the trial court's jurisdiction and for due process. Without jurisdiction over the parties, an in personam judgment is invalid. . . . For over 50 years, California has recognized that a judgment may not be entered either for or against one who is not a party to an action or proceeding.

214 Cal. App. 3d at 717. The due concerns present in *Bronco Wine* are equally applicable to the present case, and militate in favor of dismissing any and all claims for restitution on behalf of non-parties. [2]

2 Although the parties have not raised these issues, the Court is also concerned with issues of Article III standing and subject matter jurisdiction. Clearly, California law does not relieve a federal court sitting in diversity from the constraints of Article III. The Court is concerned that Plaintiffs do not have standing to assert the claims of non-parties in federal court. Further, the Court is concerned that it would not have subject matter jurisdiction to grant restitution to any potential non-parties who are non-diverse from Defendant Allstate (i.e. Allstate insureds who own affected property in California, but are citizens of Illinois).

[*19] Plaintiffs assert that the holding in *Bronco Wine* was undermined by the rulings in *Dean Witter* and *Powers*. [Opp. at p. 11]. As noted above, *Powers* is clearly inapposite. *Dean Witter*, on the other hand, was decided before *Bronco Wine* and was specifically called into doubt by the *Bronco Wine* opinion. *See Bronco Wine*, 214 Cal. App. 3d at 719-20 (seriously questioning the propriety of the holding in *Dean Witter*, and distinguishing *Dean Witter* based on the facts). In conclusion, the *Bronco Wine* court noted "whatever propriety there may be in allowing an individual, representative action [under Cal. Bus. &. Prof. Code § 17200 *et seq.*] in *Dean Witter Reynolds* does not exist in the instant action." *Id.* At 720. The same holds true in the instant action.

Even if adequately alleged, this Court may not award restitution to non-parties based on Plaintiff's allegations of widespread bad faith as to non-parties' insurance claims. Those non-parties would be required to be present in this action in order for the Court to grant or deny them relief without running afoul of due process. Accordingly, Plaintiffs' fourth cause of action is DISMISSED [*20] WITH PREJUDICE as to the portions of the claim that seek restitution and other equitable relief on behalf of non-parties.

c. Plaintiffs' Request for Injunctive Relief (Fourth Cause of Action)

In their fourth cause of action, Plaintiffs request "on behalf of the general public, . . . that an injunction against the Defendants [sic] issue to enjoin them from continuing to engage in the unlawful conduct alleged herein." [Compl. P 72]. As noted above, the conduct that Plaintiffs allege involves only Allstate's handling of *their* claims for property damage at 435 and 454 North Sweetzer, and does not involve Allstate's conduct toward the "general public." [3] These claims have been resolved, albeit not to Plaintiff's satisfaction. Therefore, the conduct sought to be enjoined has already occurred and is not continuing. Consequently, Plaintiffs' request for an injunction to prohibit such past conduct is moot. *See e.g. In re Combined Metals Reduction Co.*, 557 F.2d 179, 189 (9th Cir. 1977) ("where an act or event sought to be enjoined has been performed or has occurred, an appeal from the denial of the injunction will be dismissed as moot"); *Holloway v. United States*, 789 [*21] F.2d 1372, 1374 (9th Cir. 1986) ("The act or event sought to be prohibited by the Holloways was the sale of their property. That sale has already occurred. The appeal from the district court's denial of a petition for a writ of prohibition must therefore be dismissed as moot."). Because Allstate has already concluded its handling of Plaintiffs' claims for property damage arising from the March 20, 1994 aftershock, a requested injunction to enjoin Allstate's alleged bad faith handling of those claims must be dismissed as moot.

3 Accordingly, for reasons noted above, Plaintiffs may not sue "on behalf of the general public" for an injunction directed solely at enjoining Allstate's bad faith conduct in handling *Plaintiffs'* claims.

In its Opposition, Plaintiffs indicate that Cal. Bus & Prof. Code § 17203 permits the Court to enjoin any person "who engages, *has engaged*, or proposes to engage in unfair competition." [Opp. at p. 13]. Thus, Plaintiffs impliedly argue that this state statute authorizes the [*22] issuance of a moot injunction in federal court. The doctrine of mootness, however, has its foundations in the "case and controversy" requirement for justifiability under Article III of the United States Constitution. *See generally* Laurence H. Tribe, *American Constitutional Law*, § 3-11 (2d ed.) (Foundation Press 1988). In the instant case, Plaintiffs' requested injunction does satisfy any of the exceptions to the mootness bar (i.e. past conduct that is "capable of repetition, yet evading review"). [4] Accordingly, Plaintiffs' fourth cause of action is DISMISSED WITH PREJUDICE as to their request for an injunction against Allstate based on its past handling of Plaintiffs' claims.

4 Plaintiffs' claims for damages from a 1994 aftershock will not be made again. Accordingly, Allstate's alleged bad faith handling of those claims will not be repeated.

d. Plaintiffs' Fifth Cause of Action for Declaratory Relief

Defendant argues that Plaintiffs' cause of action for declaratory relief fails as a matter of [*23] law because their breach of contract action is adequate to determine their rights under the policy. Defendant relies solely on state court decisions in support of this argument. The argument is without merit. Plaintiffs' cause of action for declaratory relief is properly before the Court under the Declaratory Judgment Act, 28 U.S.C. § 2201, and Rule 57 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 57 provides that "the existence of another adequate remedy [i.e. breach of contract] does not preclude a judgment for declaratory relief in cases where it is appropriate." Defendant apparently concedes this issue by failing to raise it again in its Reply. In any event, Defendant's Motion to Dismiss is DENIED as to Plaintiffs' fifth cause of action for declaratory relief.

e. Plaintiffs' Claim for Punitive Damages (First Cause of Action)

Defendant argues that Plaintiff has failed to meet the strict pleading requirements imposed by California courts on plaintiffs seeking punitive damages. Federal courts, however, do not require strict fact pleading under Fed. R. Civ. P. 8(a). All that is required is a "short and plain statement" of a claim for entitlement to punitive damages. [*24] Fed. R. Civ. P. 8(a). In their Complaint, Plaintiffs allege that "Allstate has acted with despicable conduct and with a conscious disregard of the rights of [Plaintiffs]." This allegation is sufficient to state a claim for entitlement to punitive damages under federal pleading standards. Again, Defendant appears to concede this argument because it does not raise it in the Reply. In any event, Defendant's Motion to Dismiss is DENIED as to Plaintiffs' prayer for punitive damages.

IV. Conclusion

For all of these reasons, the Court hereby ORDERS that Defendant's motion to Dismiss is GRANTED IN PART and DENIED IN PART as follows:

(1) Plaintiffs' third cause of action is DISMISSED WITH LEAVE TO AMEND to the extent it is intended to state a claim for negligence based on the conduct of Hillman before the submission of Plaintiffs' claim. [5] To the extent that the third cause of action is intended to state a claim for negligence in the handling of Plaintiffs' claim, it is DISMISSED WITH PREJUDICE; [6]

(2) Plaintiffs' fourth cause of action is DISMISSED WITH PREJUDICE as to the portions of the claim that seek restitution and other equitable relief on behalf of non-parties;

(3) [*25] Plaintiffs' fourth cause of action is DISMISSED WITH PREJUDICE as to their request for an injunction against Allstate based on its past handling of Plaintiffs' claims; and

(4) Defendant's Motion to Dismiss is DENIED as to Plaintiffs' fifth cause of action for declaratory relief and their prayer for punitive damages in their first cause of action for bad faith.

5 Any proposed amendment to Plaintiff's third cause of action should incorporate a "short and plain statement" of this theory of negligence.

6 Any proposed amendment to Plaintiffs' third cause of action should omit any references to negligent claims handling, which is not actionable in California under a negligence theory.

SO ORDERED.

DATED: July 21, 1997

AUDREY B. COLLINS

UNITED STATES DISTRICT JUDGE

Melancon v. USAA Cas. Ins. Co.
Ariz.App. Div. 2,1992.

Court of Appeals of Arizona,Division 2, Department B.
Ralph A. MELANCON, Jr., and Kristine Nord Melancon, husband and wife, Plaintiffs/Appellees, Cross-Appellants,
v.
USAA CASUALTY INSURANCE COMPANY, a Texas corporation, Defendant/Appellant/Cross-Appellee.
No. 2 CA-CV 92-0059.

June 30, 1992.
Review Granted on Issues 1, 2 and 4, Denied on all other Issues; Cross-Petition for Review Denied May 4, 1993.

Insureds brought action against casualty insurer after insurer reduced for depreciation replacement coverage for damages to automobile. The Superior Court, Maricopa County, Cause No. CV 88-09506, Daniel E. Nastro, J., entered judgment on jury verdict in favor of insureds, denied insurer's motions to alter or amend judgment, for new trial, and for judgment notwithstanding the verdict, and granted insurer's motion for remittitur of punitive damages award, and insurer appealed. The Court of Appeals, Hathaway, J., held that: (1) policy did not authorize insurer to reduce coverage for depreciation, but (2) instructions erroneously implied that violation of standards taken verbatim from rule promulgated by Department of Insurance to flesh out Arizona Unfair Claim Settlement Practices Act gave insureds right to seek judicial remedy, in direct contravention of express language of Act.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Insurance 217 ⚿2719(2)

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(B) Property Coverage
217k2717 Amounts Payable; Extent of Damage or Loss
217k2719 Total or Partial Loss
217k2719(2) k. Repair or Replacement. Most Cited Cases
(Formerly 217k506(2))
Under automobile policy defining insurer's limit of liability for loss to be "the lesser of the: (1) actual cash value of the stolen or damaged property; or (2) amount necessary to repair or replace the property," insurer did not have authority to reduce coverage for depreciation based upon wear and tear after it undertook repair or replacement; plain language of policy negated insurer's contention that phrase "actual cash value," which insurer argued implied a reduction attributable to depreciation, applied to subsection (2) as well as subsection (1).

[2] Insurance 217 ⚿3379

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3378 Actions
217k3379 k. In General. Most Cited Cases
(Formerly 217k602.12(1))
Where Arizona Unfair Claim Settlement Practices Act specifically prohibited any private right of action for violation of the statute, it was improper to instruct the jury, in the insureds' action against their automobile insurer for breach of duty of good faith and fair dealing, verbatim from regulations promulgated by the Arizona Department of Insurance to flesh out the Act to effect that insurer is required to reply within ten working days to communications from a claimant expecting a response and cannot deny claim on grounds of specific policy provision without referring to provision in denial; the instructions implied that violation of those standards gave insureds right to seek judicial remedy, in direct

contravention of express language of Act. A.R.S. §§ 20-143, 20-461; § 20-461, subd. C (1989).

[3] Trial 388 ⚷295(1)

388 Trial
388VII Instructions to Jury
388VII(G) Construction and Operation
388k295 Construction and Effect of Charge as a Whole
388k295(1) k. In General. Most Cited Cases

Jury instructions must be viewed as whole to determine whether they collectively provided jury with proper rules for decision making.

[4] Trial 388 ⚷268

388 Trial
388VII Instructions to Jury
388VII(E) Requests or Prayers
388k268 k. Refusal of Requests. Most Cited Cases

Instructions that do not correctly state the law must be refused.

[5] Appeal and Error 30 ⚷1064.1(1)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1064 Prejudicial Effect
30k1064.1 In General
30k1064.1(1) k. In General. Most Cited Cases

Jury verdict cannot stand if instructions given create substantial doubt as to whether jury was properly guided in its deliberations.

[6] Insurance 217 ⚷3335

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3335 k. In General. Most Cited Cases
(Formerly 217k602.1)

Neither Arizona Unfair Claim Settlement Practices Act nor rule adopted to effectuate it creates private right or cause of action. A.R.S. §§ 20-143, 20-461; § 20-461, subd. C (1989).

[7] Action 13 ⚷1

13 Action
13I Grounds and Conditions Precedent
13k1 k. Nature and Elements of Cause of Action and Suspension of Remedies. Most Cited Cases

A "cause of action" is a single core of operative facts that entitle a person to sustain an action and seek a judicial remedy.

[8] Insurance 217 ⚷3335

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3335 k. In General. Most Cited Cases
(Formerly 217k602.1)

Arizona Unfair Claim Settlement Practices Act was intended to give Department of Insurance guidelines for determining whether insurer's procedures and practices occur with such frequency as to indicate an unacceptable general business practice; provisions are not standard of conduct against which insurer's conduct in handling individual claim is to be measured for creating a claim for relief. A.R.S. §§ 20-143, 20-461; § 20-461, subd. C (1989).

[9] Insurance 217 ⚷3335

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3335 k. In General. Most Cited Cases
(Formerly 217k602.1)

Violation of Arizona Unfair Claim Settlement Practices Act does not, expressly or by implication, give rise to civil liability in tort. A.R.S. § 20-461.

**1375 *345 Arnett & Arnett by Wayne C. Arnett and Mark W. Arnett, Tempe, for plaintiffs/appellees/cross-appellants.
Kornblum, Ferry & Frye, P.C. by Guy O. Kornblum, E. Lynn Malchow and James E. Gibbons, Los Angeles, CA, Bess & Dysart, P.C. by Leon D. Bess and Timothy R. Hyland, Phoenix, for defendant/appellant/cross-appellee.
Neil Vincent Wake, Phoenix, for amicus curiae Nat. Ass'n of Independent Insurers.
O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, P.A. by Ralph E. Hunsaker, Frank M. Fox and Christopher Robbins, Phoenix, for amicus curiae State Farm Mut. Auto. Ins. Co.

OPINION

HATHAWAY, Judge.
This case arose because of a disagreement between an insurance company, appellant USAA Casualty Insurance Company (USAACIC) and its insureds, appellees Ralph and Kristine Melancon (Melancons), over the issue of appellant's taking depreciation on certain parts used to repair the Melancons' vehicle to reduce its coverage of those repairs after an accident with an uninsured driver.

The Melancons filed suit against USAACIC alleging that their collision claim was wrongfully handled. After a jury trial, a verdict was returned in the Melancons' favor in the following amounts: $286.89 for breach of contract; $2,500 for breach of the duty of good faith and fair dealing; and, $4,500,000 as punitive damages. The trial court denied USAACIC's motion to alter or amend the judgment, motion for a new trial, and motion for judgment notwithstanding the verdict. The trial court granted a motion for remittitur and reduced the punitive damage award to $2,000,000.

On November 12, 1986, Ralph Melancon was involved in an automobile accident with an uninsured motorist. The following day, USAACIC was informed of the accident. The Melancons filed a claim under their collision coverage for damage to their vehicle and under their uninsured motorist coverage for his bodily injuries. The uninsured motorist claim was satisfactorily resolved and is not a part of this litigation.

USAACIC assigned the appraisal of the Melancons' vehicle to Property Damage Appraisals (PDA), independent appraisers. The appraisal was completed on November **1376 *346 17, 1986, and a check was issued to the Melancons and ABC Nissan, the repair facility, in the full amount of the appraisal, $2,441.43, minus a $250 deductible. No deduction for depreciation was taken from the initial appraisal. These repairs were to body parts. Notation was made that there might be additional damage to the front suspension discovered when the body panels were removed.

A second appraisal pertained to the front end damage and included the windshield, which had been cracked in the accident and fell into two pieces when removed in order to do some body repairs. USAACIC deducted depreciation in the amount of $286.39 for parts in the front end which it claimed were subject to wear and tear. Melancons objected to the taking of depreciation and this lawsuit followed.

On appeal, USAACIC raises four issues: (1) whether the evidence was sufficient to support a finding of bad faith by USAACIC; (2) whether the jury was insufficiently and incorrectly instructed on the issue of bad faith; (3) whether the punitive damage award was unwarranted and unsupported by the evidence; and, (4) whether prejudicial errors occurred in the trial court's evidentiary rulings which resulted in an unfair trial. Appellees, on cross-appeal, argue that the granting of the remittitur was error.

The National Association of Independent Insurers (NAII), as amicus curiae, raises the issue of the constitutionality of the punitive damage award.

State Farm Mutual Automobile Insurance Company (State Farm), also as amicus curiae, argues that the trial court erred in instructing the jury based upon Department of Insurance Regulation A.C.R.R. R4-14-801, promulgated under the Arizona Unfair Claim Settlement Practices Act (A.R.S. § 20-461).

[1] In defining its limit of liability, the policy issued by appellant to appellees stated: "Our limit of liability for loss will be the lesser of the: (1) Actual cash value of the stolen or damaged property; or (2) Amount necessary to repair or replace the property." The policy does not mention depreciation, much less expressly authorize USAACIC to deduct it in determining the amount of coverage under subsection (2). USAA argued that "actual cash value" implies a reduction attributable to depreciation and that this term applied to subsection (2) as well as subsection (1). However, the plain language of the policy negates this contention. The policy states its limitations on liability in the disjunctive: Appellant would either pay the actual cash value of the damaged property *or* pay to repair or *replace* the damaged property, whichever was less. The policy did not state that "if new parts are used to replace parts subject to wear and tear, depreciation will be taken to the extent of the wear and tear." Here, appellant chose to replace the damaged parts. Nothing in the policy authorized a reduction in coverage for depreciation. We, therefore, affirm the jury's verdict for damages based on breach of contract in the amount of $286.89, the amount taken by appellant for depreciation.

Appellant raises numerous issues pertaining to the bad faith and punitive damages claims. Because we find that the jury was erroneously instructed, we reverse the judgment for consequential and punitive damages. We find the damages for breach of contract unaffected and, accordingly, affirm as to those.

[2] Among the instructions given the jury were the following:

Under Arizona law an insurer is required to reply within ten working days on all pertinent communications from a claimant which reasonably suggests that a response is expected. [Emphasis added.]

An insurance company cannot deny a claim on the grounds of a specific policy provision, condition or exclusion unless reference to such provision, condition or exclusion is included in the denial.

Appellant made a timely objection to these instructions on the ground that they were taken verbatim from regulations promulgated by the Arizona Department of Insurance to flesh out A.R.S. § 20-461 which specifically prohibits any private right of action for a violation of the statute. We agree with appellant's position.

**1377 *347 [3][4][5] Jury instructions must be viewed as a whole to determine whether they collectively provided the jury with the proper rules for its decision making. *Andrews v. Fry's Food Stores of Arizona,* 160 Ariz. 93, 95, 770 P.2d 397, 399 (App.1989). Instructions that do not correctly state the law must be refused. *Durnin v. Karber Air Conditioning Co.,* 161 Ariz. 416, 419, 778 P.2d 1312, 1315 (App.1989). A jury verdict cannot stand if the instructions given create substantial doubt as to whether or not the jury was properly guided in its deliberations. *Id.*

[6] A.R.S. § 20-461, the Arizona Unfair Claim Settlement Practices Act (the Act), provided that "[a] person shall not commit or perform with such a frequency to indicate as a general business practice any of the following:" [followed by sixteen numbered practices]. The Act expressly states that its provisions are "to provide solely an administrative remedy to the director for any violation of this section or rule related thereto." A.R.S. § 20-461(C). The Act states that its provisions do not create a private right or cause of action. The legislative intent for enacting the Act is stated to provide "solely an administrative remedy" for any violation of the Act or any rule related to the Act.

Appellees argue that the rule in question, rule

R4-14-801, was promulgated under A.R.S. § 20-143 which gives the Director of the Department of Insurance authority to issue reasonable rules necessary to effectuate any provision of Title 20 (Insurance Code). We do not agree. The summary of the rule approved by the Attorney General discloses that R4-14-801 was adopted to effectuate the Act. It states: "This Rule defines certain minimum standards which, if violated with such frequency as to indicate a general business practice, will be deemed to constitute unfair claims settlement practices." Pursuant to the clear and unambiguous language of A.R.S. § 20-461(C), neither the Act nor rule R4-14-801 creates a private right or cause of action. They are intended to provide solely an administrative remedy and have no applicability to an insured's claim against his insurance company.

[7] Appellees argue, however, that their right of action is the tort of bad faith, not for a violation of the regulations. A "cause of action" is a single core of operative facts that entitle a person to sustain an action and seek a judicial remedy. *Alexander v. Chicago Park Dist.*, 773 F.2d 850, 854 (7th Cir.1985); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 971 (5th Cir.1981). The implication of the challenged instructions is clear: If the jury found a failure to respond to pertinent communications within the time specified on the denial of the claim, then appellees were entitled to maintain an action and seek a judicial remedy. The trial court instructed the jury that violation of standards taken verbatim from the rule gave appellees the right to seek a judicial remedy. We find this in direct contravention of the express language of the Act.

[8] Appellees also argue that the rule can be considered as a standard of conduct. Rather, we find that the Act was intended to give the department of insurance guidelines for determining whether an insurer's procedures and practices occur with such frequency as to indicate an unacceptable general business practice. If so, then the administrative remedy may apply. The provisions of the Act are operational, much like the ethical considerations governing the conduct of attorneys and other professionals. The provisions are expressly not a standard of conduct against which an insurer's conduct in handling an individual claim is to be measured for creating a claim for relief.

[9] Appellees cite the Restatement (Second) Torts § 285 (1965) (the Restatement) as support for their position. That very authority defeats their argument. Comment b to § 285 provides in part:

In any or all of these respects the standard of conduct may be defined and established by a legislative enactment which lays down requirements of conduct, and *provides expressly or by implication that a violation shall entail civil liability in tort.* [Emphasis added.]

Therefore, before reaching the question of whether the Act or rule R4-14-801 established**1378 *348 a standard of conduct, it must first be determined whether the Act provides *expressly or by implication* that a violation would give rise to civil liability in tort. By the clear language of the act, the answer is no.

Assuming, arguendo, that the Restatement has any application where a statute expressly provides that it does not create a private right or cause of action, we believe § 288 of the Restatement governs. Section 288 is captioned "When Standard of Conduct Defined by Legislation or Regulation Will Not Be Adopted," and provides in pertinent part:

The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively

(a) to protect the interests of the state or any subdivision of it as such, or

(b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public ...

Comment b to § 288 is particularly enlightening in explaining the difference in effect between regulations enacted to protect the interests of the community or public at large and those enacted for the protection of an individual:

b. Many legislative enactments and regulations are intended only for the protection of the interests of the community as such, or of the public at large, rather than for the protection of any individual or class of persons. Such provisions create an obligation only to the state, or to some subdivision of the state, such as a municipal corporation. The standard of conduct required by such legislation or regulation will therefore not be adopted by the court as the standard of a reasonable man in a negligence action brought by the individual.

As noted above, rule R4-14-801 was enacted solely to provide the Arizona Department of Insurance an administrative method to safeguard the public, not to provide a cause of action for any individual.

We believe the trial court erred in instructing the jury based on language taken directly from rule R4-14-801, thereby serving to create a private right of action in direct contravention of the Act. We believe the incorrect statement of the law misguided the jury to appellant's prejudice. Accordingly, the judgment is affirmed as to the damages for breach of contract, reversed as to the rest and remanded for further proceedings consistent with this decision.

Because of our reversal of the bad faith and punitive damages part of the judgment, we need not address the cross-appeal nor the constitutional issue raised by amicus curiae NAII. We do not address the evidentiary issues raised by appellant as we cannot anticipate the evidentiary posture should a retrial occur.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this decision.

FERNANDEZ, P.J., and DRUKE, J., concur.
Ariz.App. Div. 2,1992.
Melancon v. USAA Cas. Ins. Co.

174 Ariz. 344, 849 P.2d 1374

END OF DOCUMENT

EXHIBIT 5

Othman v. Globe Indem. Co.
C.A.9 (Cal.),1985.

United States Court of Appeals,Ninth Circuit.
Ribhi OTHMAN and Yusif H. Mashni, individually, and doing business as E-Z Market, a partnership, Plaintiffs/Appellants,
v.
GLOBE INDEMNITY COMPANY, Defendant/Appellee.
No. 83-2075.

Argued and Submitted July 13, 1984.
Decided May 13, 1985.

Insureds brought action against insurer alleging bad faith denial of insurance coverage, intentional infliction of emotional distress, and seeking punitive damages. The United States District Court for the Eastern District of California, Thomas J. MacBride, J., entered a directed verdict against insureds, and insureds appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) the Court of Appeals had jurisdiction; (2) question of whether second denial by insurer to consider claim was in bad faith was for jury; (3) insureds failed to establish that conduct of insurer constituted intentional infliction of emotional distress; and (4) issue of punitive damages should have gone to jury.

Affirmed in part and reversed and remanded in part.

West Headnotes

[1] Federal Courts 170B ⚷31

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk29 Objections to Jurisdiction, Determination and Waiver
170Bk31 k. Waiver or Consent. Most Cited Cases

Jurisdiction cannot be conferred on federal courts by consent.

[2] Federal Courts 170B ⚷542

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(B) Appellate Jurisdiction and Procedure in General
170Bk542 k. Determination of Question of Jurisdiction. Most Cited Cases

The Court of Appeals has an independent duty to satisfy itself of its jurisdiction and that of lower court.

[3] Insurance 217 ⚷3359

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3359 k. In General. Most Cited Cases
(Formerly 217k563)

Insurance 217 ⚷3361

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3361 k. Investigations and Inspections. Most Cited Cases
(Formerly 217k563)

Filing of complaint by insureds against insurer did not make insurer and insureds adversaries so as to eliminate insurer's duty to consider insureds' interests on a level equal to its own and to inquire fully into any possible basis that might have supported insureds' claim under fire policy.

[4] Removal of Cases 334 ⚷39

334 Removal of Cases

334III Citizenship or Alienage of Parties
334k39 k. Dismissal as to One or More Coparties. Most Cited Cases
If a state action includes nondiverse parties, it may not be removed until those parties have been dismissed.

[5] Federal Courts 170B ⚿312.1

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(C) Pleading
170Bk312 Sufficiency of Allegations
170Bk312.1 k. In General. Most Cited Cases
(Formerly 170Bk312)

Federal Courts 170B ⚿315

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(C) Pleading
170Bk315 k. Amendments. Most Cited Cases
Generally, a Doe pleading is improper in federal court and mere presence of Does in a complaint requires dismissal if jurisdiction is based solely on diversity; however, if case is originally filed in federal court, court can allow jurisdictional defect to be cured.

[6] Federal Courts 170B ⚿306

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(B) Controversies Between Citizens of Different States
170Bk306 k. Dismissal as to One or More Parties. Most Cited Cases
Court may dismiss nondiverse defendants in order to preserve jurisdiction if they are not indispensable parties.

[7] Federal Courts 170B ⚿289

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(B) Controversies Between Citizens of Different States
170Bk289 k. Necessary and Unnecessary Parties; Nominal or Formal Parties. Most Cited Cases

Removal of Cases 334 ⚿107(9)

334 Removal of Cases
334VII Remand or Dismissal of Case
334k107 Proceedings for Remand and Review Thereof
334k107(9) k. Review. Most Cited Cases
Does in insurance action were not indispensable parties and served no other purpose than protecting insureds under California pleading practice; thus, Does could be dismissed by Court of Appeals, and thus, although district court initially should not have allowed removal because of presence of Doe defendants, it had jurisdiction over case at time of final judgment and jurisdiction existed in Court of Appeals.

[8] Federal Courts 170B ⚿764

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk764 k. Taking Case from Jury. Most Cited Cases
In determining propriety of directed verdict, Court of Appeals has same role as the court below.

[9] Insurance 217 ⚿3347

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3346 Settlement by Liability Insurer
217k3347 k. In General. Most Cited

Cases
(Formerly 217k563)

Insurance 217 ⚷3359

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3359 k. In General. Most Cited Cases
(Formerly 217k563)

A covenant of good faith and fair dealing is a part of every insurance contract in California, and requires an insurer to deal in good faith and fairly with its insured in handling insured's claim.

[10] Insurance 217 ⚷3335

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3335 k. In General. Most Cited Cases
(Formerly 217k602.4)

Insurance 217 ⚷3336

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3336 k. Reasonableness of Insurer's Conduct in General. Most Cited Cases
(Formerly 217k602.4)

Under California law, insurer is obligated to give interests of insured at least as much consideration as it gives its own interests and not to withhold payment of claims unreasonably, and duty is not contractual but is imposed by law and its breach constitutes a tort.

[11] Insurance 217 ⚷3419

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3416 Of Insurers
217k3419 k. Bad Faith in General. Most Cited Cases
(Formerly 217k602.1)

Under California law, duty to act in good faith is imposed upon insured.

[12] Insurance 217 ⚷3419

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3416 Of Insurers
217k3419 k. Bad Faith in General. Most Cited Cases
(Formerly 217k602.1)

Insurance 217 ⚷3425

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3425 k. Of Insureds. Most Cited Cases
(Formerly 217k602.1)

Breach of duty of fair dealing by one party to insurance contract does not excuse duty of good faith and fair dealing owing by the other; duty of good faith and fair dealing is absolute under California law, not conditional, and exists independent of any contractual conditions between the parties.

[13] Insurance 217 ⚷3361

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3361 k. Investigations and Inspections. Most Cited Cases
(Formerly 217k602.5)

Insurer did not fail to investigate claim under fire policy thoroughly or investigate in a manner that indicated its goal was to secure facts to deny coverage so as to amount to bad faith under California law where insurer promptly dispatched investigator and set up reserve to cover claimed loss, investigator reviewed all of investigations done by civil authorities and it was doubtful he could have added much to those investigations.

[14] Insurance 217 ⚿3361

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3361 k. Investigations and Inspections. Most Cited Cases
(Formerly 217k602.2(2))
Fact that insurer's investigation of claim under fire policy focused primarily on whether insured set fire did not violate insurer's duty of good faith and fair dealing under California law.

[15] Insurance 217 ⚿3212

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3210 Effect of Failure to Cooperate
217k3212 k. Prejudice to Insurer. Most Cited Cases
(Formerly 217k533)
Under California law, insurer may deny coverage on basis of insured's refusal to cooperate if it is substantially prejudiced by the refusal.

[16] Insurance 217 ⚿3339

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3339 k. Insured's Conduct as Defense. Most Cited Cases
(Formerly 217k602.5)
Insurer's initial denial of claim under fire policy because insureds failed to cooperate fully with insurer's request for examination under oath as required by policy did not constitute bad faith under California law.

[17] Insurance 217 ⚿3560

217 Insurance
217XXXI Civil Practice and Procedure
217k3560 k. Statutes of Limitations. Most Cited Cases
(Formerly 217k619)
A reasonable insurer is entitled to rely on California statute of limitations for insurance contracts in denying coverage however harsh that reliance may be.

[18] Insurance 217 ⚿3349

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3346 Settlement by Liability Insurer
217k3349 k. Insurer's Settlement Duties in General. Most Cited Cases
(Formerly 217k563)

Insurance 217 ⚿3360

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3360 k. Duty to Settle or Pay. Most Cited Cases
(Formerly 217k563)
Unreasonable failure to make any efforts toward settlement of insurance claim is sufficient to constitute breach of duty of good faith by insurer under California law.

[19] Insurance 217 ⚿3382

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3378 Actions
217k3382 k. Questions of Law or Fact.

Most Cited Cases
(Formerly 217k602.12(2))
Whether second denial by insurer to consider claim under fire policy was in bad faith under California law was a question for jury.

[20] Damages 115 57.21

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage
115k57.21 k. Elements in General. Most Cited Cases
(Formerly 115k50.10)
In order to sustain cause of action for intentional infliction of emotional distress in California, one must show outrageous conduct by defendant, defendant's intention of causing it or his reckless disregard of probability of causing emotional distress, plaintiff's suffering severe or extreme emotional distress, and actual and proximate causation of emotional distress by defendant's outrageous conduct.

[21] Damages 115 57.22

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage
115k57.22 k. Nature of Conduct. Most Cited Cases
(Formerly 115k50.10)
"Outrageous conduct," within purview of cause of action for intentional infliction of emotional distress in California, is conduct so extreme as to exceed all bounds of that usually tolerated in a civilized community.

[22] Damages 115 57.46

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.44 Insurance Practices
115k57.46 k. Claims and Settlement; Bad Faith. Most Cited Cases
(Formerly 115k56.10)
Insureds failed to show that insurer's conduct in denying claim under fire policy was so outrageous as to constitute intentional infliction of emotional distress.

[23] Insurance 217 3427

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3427 k. Questions of Law or Fact. Most Cited Cases
(Formerly 217k602.12(2))
In action brought by insureds against insurer alleging breach of duty of good faith and fair dealing, issue of punitive damages should have gone to jury.

*1460 Victoria J. De Goff, De Goff & Sherman, Berkeley, Cal., for plaintiffs/appellants.
James A. Reichman, Cooley, Godward, Castro, Huddleson & Tatum, San Francisco, Cal., for defendant/appellee.

Appeal from the United States District Court for the Eastern District of California.

Before PHILLIPS,[FN*] FLETCHER and REINHARDT, Circuit Judges.

FN* Hon. Harry Phillips, Senior United

States Circuit Judge for the Sixth Circuit, sitting by designation.

FLETCHER, Circuit Judge:

[1][2] Plaintiffs Othman and Mashni (Othman) appeal an adverse directed verdict on their causes of action against Globe Indemnity Co. (Globe) for bad faith denial of insurance coverage, intentional infliction of emotional distress, and punitive damages, all resulting from Globe's denial of a claim under a fire insurance policy.FN1 Because the complaint names "Doe" defendants, we raise *sua sponte* the issue of whether diversity jurisdiction exists.FN2

FN1. Globe does not appeal the jury verdict finding coverage under the insurance policy and awarding over $170,000 in damages.

FN2. It is well settled that jurisdiction cannot be conferred on the federal courts by consent. *See Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934). This court has an independent duty to satisfy itself of its jurisdiction and that of the lower court. *Id.*

A defendant must ordinarily remove a case to federal court within thirty days of receipt of the complaint. 28 U.S.C. § 1446(b)(1982). If the case is not initially removable, it must be removed within thirty days of receipt of a pleading from which it may be ascertained that the case is removable. *Id.*

California law permits a plaintiff to plead a "Doe" defendant when she is ignorant of the name of a defendant. *See*Cal.Civ.Proc.Code § 474 (West 1979). The purpose of this procedure is to toll the statute of limitations against such a person and allow his name to be entered later, usually after discovery, when his identity and capacity are ascertained. The problem for federal jurisdiction is created, however, because Doe pleading has become so commonplace in California that the cautious attorney pleads Does to protect herself against the possibility that other defendants may be discovered. Because Doe defendants are, by their very nature, unspecified, a federal court is unable to determine on a petition for removal whether one or more of the persons who might be Does are residents of the same state as plaintiff. *See infra* note 6.

***1461** Although the district court initially should not have allowed removal, we find that it had jurisdiction over the case at the time of final judgment, and thus, jurisdiction exists in this court. Reaching the merits, we affirm in part and reverse in part.

I

FACTS

Othman's supermarket was destroyed by fire on October 25, 1976. All of the evidence pointed towards arson. In addition, several facts raised suspicions that Othman had set the fire himself: the burglar alarm was not on the night of the fire; inventory had been increased to an unusually high level and had been purchased with cash; insurance coverage had been recently increased; and Othman had been having financial trouble. Othman made a claim for the loss under a fire insurance and business interruption policy issued by Globe.FN3

FN3. This discussion should not be taken as an indication that no contrary evidence existed. Othman claimed that he turned on the burglar alarm that night, denied that he was having financial trouble and explained the other items. The jury later found that he did not set the fire. *See infra* note 5.

Globe promptly hired a private investigator, Nye, to determine the cause of the fire. Although Nye appears to have done a thorough investigation, Othman alleges that Nye did little more than review the already complete investigation done by the civil authorities. Pursuant to policy provisions providing for an examination of the claimants under oath, Globe's lawyers deposed Othman and Mashni. Globe also requested the production of various documents relating to the claim. At the examination, Othman, on his attorney's advice, refused to produce certain documents and to answer certain questions, most of which related to the circumstances of the fire and Othman's personal financial condition.

Thereafter, the parties' lawyers exchanged correspondence, and some but not all of the requested documents were produced. Finally, on May 24, 1977, Globe denied the claim on the basis of the insured's failure to cooperate with the examination and to produce relevant requested documents.

At this point, Othman got a new lawyer, Barbagelata, who began a new round of correspondence with Globe's lawyer, Hartwell, that continued through the summer and fall of 1977. Finally, on January 11, 1978, Barbagelata stated for the first time that he had assembled the requested materials.

[3] On February 3, 1978, not having received a response to Barbagelata's tender of materials, Barbagelata's associate wrote Globe's lawyers and informed them that if they did not respond within five days Othman would proceed with a lawsuit. On February 17, 1978, Hartwell responded that Globe would not revoke its denial because the claims were now barred by the one-year statute of limitations. Fortunately for Othman, in October, a few days before the statute ran, Barbagelata had filed, but not served, his complaint.FN4

FN4. The parties dispute whether, under California law, the statute of limitations would have actually run at this time. Globe argues extensively that Barbagelata's conduct in filing the complaint without serving it or notifying Globe of it was somehow improper and that Globe cannot be guilty of bad faith conduct thereafter. We suggest only that the jury could find that such conduct was the prudent action of a careful attorney acting to preserve his client's rights. We agree with the district court that the filing of the complaint did not make Globe and Othman adversaries so as to eliminate Globe's duty to consider the insured's interests on a level equal to its own and to inquire fully into any possible basis that might support the insured's claim. *See Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 819, 620 P.2d 141, 169 Cal.Rptr. 691,*cert. denied,*445 U.S. 912, 100 S.Ct. 1271, 63 L.Ed.2d 597 (1980).

Globe removed the case from state court to federal district court in the Northern District of California. The district court raised *sua sponte* the issue of whether it had diversity jurisdiction because of the presence of Doe defendants. Plaintiff's attorney filed an affidavit stating that he had discovered no Does and that Does had been named according to standard California practice as a precautionary matter only. The court, satisfied that federal jurisdiction *1462 existed, retained the case, later transferring it to the Eastern District of California on a motion for a change of venue. At the close of plaintiff's case, the district court directed a verdict against Othman on the bad faith, intentional infliction of emotional distress, and punitive damage claims, ruling that plaintiff had not brought forward substantial evidence that would allow these claims to go to the jury. On the remaining causes of action for liability under the policy, the jury rendered a verdict in favor of plaintiffs, answering four special interrogatories in their favor, and awarding them $170,756.21.FN5

FN5. The special interrogatories and the jury's responses were as follows:

1. Did plaintiffs unreasonably refuse to

submit to an examination under oath or unreasonably refuse to produce for examination all books of account, bills, invoices and other vouchers?

YES NO X

2. Did plaintiffs either individually or with another intentionally cause the insured property to be burned?

YES NO X

3. Did plaintiffs knowingly and wilfully file a false proof of loss with intent to defraud the insurance company?

YES NO X

4. Did plaintiffs intentionally swear falsely knowing the falsity thereof as to any material fact or knowingly and intentionally conceal a material fact relating to such insurance, fire, and/or claim arising out of said fire with intent to defraud the insurance company?

YES NO X

II

JURISDICTION

[4] We raise *sua sponte* the issue of whether we have jurisdiction over this case because of the presence of "Doe" defendants, who ordinarily destroy diversity jurisdiction.[FN6] Although the circumstances under which an action including "Doe" defendants may be removed to federal court is not entirely clear in this circuit,[FN7] we need *1463 not make that determination here, because any jurisdictional defect is cured. *See Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972). If a state action includes non-diverse parties, it may not be removed until those parties have been dismissed. *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 35 S.Ct. 355, 59 L.Ed. 594 (1915). Here, the Does were not dismissed before removal. However, the Supreme Court has held that:

FN6. For example, in *Molnar v. National Broadcasting Co.*, 231 F.2d 684 (9th Cir.1956), we affirmed the trial court's dismissal of the action because the plaintiff failed to make an affirmative showing that *none* of the Does was a California resident, even though he pled that each defendant was a Delaware resident. We articulated the following rationale:

> Plaintiff alleges there were actual persons thus joined as defendants under fictitious designations, but she does not describe them or make any allegation about the respective function of each or the connection of each with the accident. It is clear, in the absence of this identification or connection or name, that the allegation of citizenship in Delaware is illusory. It was impossible for the court to say that defendants thus joined were not indispensable from the face of the complaint. At the stage where the action of the court took place, the matter must have been viewed upon the allegations of the complaint alone. Allegations founding jurisdiction of a federal court must be precise.

Id.

Also, in *Garter-Bare Co. v. Munsingwear, Inc.*, 622 F.2d 416, 423 (9th Cir.1980), one count, based on diversity jurisdiction, charged Munsingwear and several Doe defendants with conspiracy. Because the Does were not described in any way, we held no jurisdiction existed over that claim, relying on *Molnar* and *Fifty Associates v. Prudential Insurance Co. of America*, 446 F.2d 1187, 1191

(9th Cir.1970) (ambiguity about Does destroys jurisdiction).

FN7. In *Southern Pacific Co. v. Haight*, 126 F.2d 900, 904 (9th Cir.), *cert. denied*, 317 U.S. 676, 63 S.Ct. 154, 87 L.Ed. 542 (1942), a suit naming fictitious defendants was begun in state court and removed on the day of trial. We upheld jurisdiction, based on the rationale that the Does had been constructively severed from the action before it was removed. In *Preaseau v. Prudential Insurance Co. of America*, 591 F.2d 74, 77-78 n. 2 (9th Cir.1979), we held that removal on the date of trial was proper because the Does had been dismissed at that time. The issue was timeliness, and by allowing removal at that late date, the court held that the presence of the Does prevented jurisdiction until severance. *Id.*

In contrast, *Chism v. National Heritage Life Insurance Co.*, 637 F.2d 1328 (9th Cir.1981), allowed removal merely because the plaintiff named Does without charging any allegations against them. We refused to remand, stating "[t]he Doe defendants cannot destroy diversity in this case because the complaint asserts no claim of any kind against them or any of them ... [and] [i]t would be improper to remand to state court because the complaint fails to state any cause of action against any Doe defendant,"*id.* at 1330, following *Grigg v. Southern Pacific Co.*, 246 F.2d 613 (9th Cir.1957) and the line of district court cases disapproved in *Preaseau*. And, in *Hartwell Corp. v. Boeing Co.*, 678 F.2d 842 (9th Cir.1982), the panel followed the same line of district court cases disapproved in *Preaseau* and sought to distinguish *Preaseau* on specificity grounds despite the language in *Preaseau* stating: "We believe that the district courts have misread the *Haight-Grigg* line of decisions in making a distinction according to the degree of identification of Does in complaints." *Preaseau*, 591 F.2d at 77 n. 2.

where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.
Grubbs, 405 U.S. at 702, 92 S.Ct. at 1347.

[5][6][7] The crucial question, then, is whether the district court would have had original jurisdiction. Generally, Doe pleading is improper in federal court and the mere presence of Does in a complaint requires dismissal if jurisdiction is based solely on diversity. *See Garter-Bare Co. v. Munsingwear, Inc.*, 622 F.2d 416, 423 (9th Cir.1980); *Fifty Associates v. Prudential Insurance Co. of America*, 446 F.2d 1187, 1191 (9th Cir.1970); *Molnar v. National Broadcasting Co.*, 231 F.2d 684 (9th Cir.1956). However, had the case been filed originally in federal court, the court could allow the jurisdictional defect to be cured. Accordingly, the district court could have had proper original jurisdiction. A court may dismiss non-diverse defendants in order to preserve jurisdiction if they are not indispensable parties. *Inecon Agricorporation v. Tribal Farms, Inc.*, 656 F.2d 498, 500 (9th Cir.1981). Although the district court never formally dismissed the Doe defendants, it could have, and this court may now do so if warranted. *Ross v. International Brotherhood of Electrical Workers*, 634 F.2d 453, 456-57 (9th Cir.1980). When proceedings began in the district court, Othman was not aware of the existence of any actual Doe defendant. No actual persons as substitutes for Does were ever joined, and Othman has stated to this court that there is no objection to dismissing the Does. Accordingly, the Does are not indispensable parties and served no other purpose than protecting the plaintiffs under California

pleading practice. Under these circumstances, the Does should be and are now dismissed, and consequently jurisdiction is proper in this court. *See id.* at 457.

III

STANDARD OF REVIEW

[8] In determining the propriety of a directed verdict, this court has the same role as the court below. *See Shakey's Inc. v. Covalt,* 704 F.2d 426, 430 (9th Cir.1983). A directed verdict is proper if the evidence permits only one reasonable conclusion. *Id.* The court must examine all the evidence in the light most favorable to the nonmoving party to decide whether there is substantial evidence that could support a finding in favor of that party. *See Browne v. McDonnell Douglas Corp.,* 698 F.2d 370, 371 (9th Cir.1982), *cert. denied,*461 U.S. 930, 103 S.Ct. 2092, 77 L.Ed.2d 301 (1983). Federal law guides this determination. *Id.*

IV

BAD FAITH CLAIMS

Othman's allegations of bad faith arise primarily in three areas: Globe's investigation of the fire, Globe's initial denial of the claim on the basis of Othman's failure to provide all of the information requested at the examinations, and Globe's second denial of the claim, with a note that suit was barred because the statute of limitations had run after promising reconsideration. We find that Othman presented enough evidence of bad faith on the part of Globe in respect to the second denial to permit that claim to go to the jury.

***1464** A. *The Duty of Good Faith and Fair Dealing.*

[9][10] A covenant of good faith and fair dealing is a part of every insurance contract in California, and requires an insurer to deal in good faith and fairly with its insured in handling an insured's claim against it. *See Gruenberg v. Aetna Insurance Co.,* 9 Cal.3d 566, 510 P.2d 1032, 1037, 108 Cal.Rptr. 480, 485 (1973). The insurer is obligated to give the interests of the insured at least as much consideration as it gives its own interests and not to withhold payment of claims unreasonably. *See Silberg v. California Life Insurance Co.,* 11 Cal.3d 452, 460, 521 P.2d 1103, 1109, 113 Cal.Rptr. 711, 717 (1974). This duty is not contractual, but is imposed by law, and its breach constitutes a tort. *See Gruenberg,* 9 Cal.3d at 574, 510 P.2d at 1037, 108 Cal.Rptr. at 485.

[11][12] To be sure, a similar duty to act in good faith is imposed upon the insured, for "neither party [may] do anything which will injure the right of the other to receive the benefits of the agreement." *Comunale v. Traders & General Insurance Co.,* 50 Cal.2d 654, 658, 328 P.2d 198, 200 (1958). Nonetheless, a breach of a duty by one party does not excuse the duty of good faith and fair dealing owing by the other-the duty of good faith and fair dealing is absolute, not conditional, and exists independent of any contractual conditions between the parties. *See Gruenberg,* 9 Cal.3d at 578, 510 P.2d at 1040, 108 Cal.Rptr. at 488. In light of these general principles of California law, we turn to an examination of the specific facts of this case.

B. *Globe's Investigation.*

[13][14] We find no substantial evidence that Globe's investigation was not reasonably thorough and prompt. Globe promptly dispatched an investigator, Nye, and set up a reserve to cover the claimed loss.[FN8] Nye reviewed all of the investigations done by the civil authorities and it is doubtful he could have added much to those investigations. Still, Othman relies on *Egan v. Mutual of Omaha Insurance Co.,* 24 Cal.3d 809, 819, 620 P.2d 141, 145, 169 Cal.Rptr. 691, 695 (1979), *cert.*

445 U.S. 912, 100 S.Ct. 1271, 63 L.Ed.2d 597 (1980), for the principle that the insurer must fully inquire into any possible basis that might support the insured's claim, and alleges that Nye failed to make such a full inquiry. While we recognize that Globe's investigation focused primarily on whether Othman set the fire, we do not find that this violates the principle of *Egan* because that issue was the sole unresolved question about the claim. In *Egan* the insurer made no effort to contact the insured's physicians whose opinions were obviously material to the appraisal of a disability claim. *Id.* at 817, 620 P.2d at 144, 169 Cal.Rptr. at 694. By contrast, Nye contacted the persons who had relevant information and naturally focused his investigation on the material unsolved question-who set the fire. Although in hindsight we may perhaps *1465 think of avenues not fully explored, *see Austero v. National Casualty Co.*, 84 Cal.App.3d 1, 32, 148 Cal.Rptr. 653 (1978), we cannot say that Globe failed to investigate the claim thoroughly or investigated in a manner that indicated its goal was to secure facts to deny coverage.

FN8. The district court found,

> The first thing that they did was to promptly investigate the loss, there's no denial of that. They promptly provided the plaintiffs with loss claim forms. They dealt fairly and reasonably with the claims-with the claims man hired by the plaintiffs, these are all undisputed, everything that I've said so far is undisputed. They promptly investigated the loss, they sent their people out there, they promptly provided the plaintiffs with their loss claim forms and the claims man himself, Mr. Pettitt, stated into the record that he felt that they had dealt fairly and reasonably with him. As a matter of fact, they even told him that they would give him an extension if he needed more time to complete and file his proof of loss on behalf of the plaintiffs. Now, the fact they had no intention-no initial intention of denying the loss is reflected-in other words, that they didn't start out having it fixed in their mind, and their feet in cement that they were going to deny the loss is reflected by the fact the initial investigation report, reported a complete loss, they figured it was a complete loss and the company was advised to set aside the limits of the policy as a reserve. Now, at that point there was no suggestion that they-to use your language, Mr. Barbagelata, that they set right out with the intention of wanting to deny the claim and that they were then bound upon an investigation that would substantiate and would support the position that they had taken to deny the claim.

C. *The Initial Denial of the Claim.*

[15][16] Globe denied the claim initially because Othman failed to cooperate fully with Globe's request for examination under oath as required by the insurance policy. Othman argues that under *Gruenberg* his alleged failure to comply with the examination clause did not excuse Globe's duty of good faith. We agree, *see Gruenberg*, 9 Cal.3d at 577-78, 510 P.2d at 1039-40, 108 Cal.Rptr. at 487-88, but it does not necessarily follow that the duty was violated. An insurer may deny coverage on the basis of the insured's refusal to cooperate if it is substantially prejudiced by the refusal. *Id.* at 577, n. 8, 510 P.2d at 1039, n. 8, 108 Cal.Rptr. at 487, n. 8; *Robinson v. National Automobile & Casualty Insurance Co.*, 132 Cal.App.2d 709, 282 P.2d 930 (1955). In *Robinson*, the court held that prior insurance history of an insured was material information and that a refusal to answer questions relating to acquisition of a safe deposit box, acquisition of cash for the reacquisition of jewelry, and various matters relating to the insured's proceedings was material.

The information that Othman refused to furnish was in many respects similar to that in *Robinson*: bank records, financial condition, source of the cash to acquire the abnormal inventory. The information was material. Without it, Globe lacked relevant information that might help to prove who set the fire. Upon a review of the record as a whole, we find no substantial evidence that Globe did not have a good faith belief that Othman may have set the fire.

This case is similar to *Blake v. Aetna Life Insurance Co.*, 99 Cal.App.3d 901, 160 Cal.Rptr. 528 (1979). In *Blake* the plaintiff claimed that Aetna failed in bad faith to pay under a double indemnity clause of an insurance policy. Aetna, however, had overwhelming evidence that pointed to the *probability* of suicide, *see Blake,* 99 Cal.App.3d at 920, 160 Cal.Rptr. at 539, but recognized that this was a case in which no one would ever know for certain what happened. The court observed that Aetna did not deny coverage, but continued to investigate. The court found no bad faith because under the policy the plaintiff had the burden of proving that the death was caused by an accident and not by suicide. *See Blake,* 99 Cal.App.3d at 924, 160 Cal.Rptr. at 541.

Also similar is *Austero,* in which the insurer denied coverage under a disability policy because the plaintiff's policy had lapsed and most medical opinions indicated lack of disability. Yet, "[t]here was a continuing effort by the insurer, via requests for information directed to the plaintiff which went unanswered, ... to determine if plaintiff performed the ... duties of his profession." 84 Cal.App.3d at 35, 148 Cal.Rptr. 653. The court therefore found no bad faith in the insurer's denial.

In both *Austero* and *Blake,* the court emphasized that the insurer agreed to reconsider its denial and thoroughly investigated the case, as did Globe in this case. *See id.; Blake,* 99 Cal.App.3d at 924, 160 Cal.Rptr. at 542. The *Austero* court, on rehearing, clearly rejected the suggestion that insurers deny claims in first-party cases at their own risk; rather, the test is whether the insurer's conduct is unreasonable. *See Austero,* 84 Cal.App.3d at 37, 148 Cal.Rptr. 653. The *Blake* court observed, "it was not unreasonable for Aetna to take the position at any given time before trial that good faith doubts as to whether the death was an accident or a suicide should be resolved against the claimant." *Blake,* 99 Cal.App.3d at 924, 160 Cal.Rptr. at 541.

In this case, Globe did agree to reconsider its claim when plaintiff's new attorney agreed to provide the requested information. Viewed in conjunction with the reasonableness of the investigation and plaintiff's refusal to cooperate, Globe's conduct to this point was not in bad faith. We now turn to the events surrounding the reconsideration.

***1466** D. *The Denial of Reconsideration.*

The most troubling issue is Globe's denial of reconsideration of Othman's claim. After Globe's initial denial of Othman's claim on May 24, 1977, Othman retained a new attorney, Barbegelata, on June 10, 1977. Barbagelata wrote to Hartwell on June 10, 1977, stating that the reasons for the claim denial were unclear. On July 21 Hartwell responded, as he always had, that the claim was denied because of Othman's noncompliance with the examination requirement. Barbagelata responded on September 1 offering to provide information. Hartwell then responded on September 19 that he would discuss the matter with Globe and on September 26 told Barbagelata what information Globe wanted and had previously requested. Hartwell testified at trial that his letter of September 26 was intended as an offer to reconsider if Barbagelata provided the requested information.

On November 10, 1977, Barbagelata's associate wrote to Hartwell to report that they were in the process of obtaining the requested documentation. Two months later, on January 11, 1978, Barbagelata's associate told Hartwell by letter that most of the information had been obtained and that they should agree on a date for the examination of Othman.

Hartwell was in trial at the time so his secretary replied that he would contact Barbagelata's office as soon as possible. The next letter from Barbagelata's associate was dated February 3, 1978, and told Hartwell that they would proceed with a lawsuit if Hartwell did not respond in five days. On February 17, 1978, Hartwell, after consulting with Globe, sent Barbagelata the following letter:

Royal Globe has advised me that it does not wish to revoke its denial of the claims of the insured of which they were advised by letter dated May 24, 1977.

Any claims of the insureds under the policy are barred for failure to bring suit within one year from the inception of the loss as set forth in the California standard form fire insurance policy.

[17][18] Although it is not entirely clear when the statute of limitations on an insurance contract runs in California,[FN9] a reasonable insurer is entitled to rely on the statute in denying coverage, however harsh that reliance may be.[FN10] But whether Globe *1467 was entitled to rely on the statute is not in issue here. There is a question whether Globe was ever genuinely interested in obtaining the answers to the questions it had asked Othman. Globe's abrupt refusal to consider the information, at precisely the time when it believed that a failure to negotiate could no longer subject it to liability, suggests that it may not have been. There is also a question whether, even assuming some genuine interest on Globe's part, Hartwell's failure to respond to Barbagelata's correspondence for the three months preceding the expiration of the statute-from the time the offer to reconsider was made on September 26, 1977, until the "statute of limitations" letter was sent on February 17, 1978-constitutes unreasonable conduct. An unreasonable failure to make any efforts toward settlement is sufficient to constitute a breach of the duty of good faith. *See Gruenberg,* 9 Cal.3d at 573-74, 510 P.2d at 1037, 108 Cal.Rptr. at 485; *Crisci v. Security Insurance Co.,* 66 Cal.2d 425, 430, 426 P.2d 173, 176, 58 Cal.Rptr. 13, 16 (1967) (plaintiff had not shown dishonesty, fraud, or concealment).

FN9. *See supra* note 4; *see also Murphy v. Allstate Insurance Co.,* 83 Cal.App.3d 38, 147 Cal.Rptr. 565 (1978) (bad faith action not action "on the policy" and one-year statute does not apply); *Richardson v. Allstate Insurance Co.,* 117 Cal.App.3d 8, 172 Cal.Rptr. 423 (1981) (two-year statute applies for bad faith action); *Hartford Accident & Indemnity Co. v. Superior Court,* 121 Cal.App.3d 249, 175 Cal.Rptr. 282 (1981) (statute runs from discovery of insured's concealment of facts).

FN10. The district court observed:

> [T]he principal issue in the case boils down to the question of whether the defendants were guilty of any fraudulent, outrageous, or malicious conduct against the plaintiffs, or whether they dealt with them unfairly by continuing after May 24th, 1977 to deal and correspond with the plaintiffs for the purpose of acquiring or viewing the materials they sought, receiving offers of cooperation from the plaintiffs and then abruptly denying the claim again on February 17th, 1978 on the grounds that it was time barred under the provisions of the policy. This is the sticky area in the whole case; in other words, between that first denial and the second denial where these negotiations were ongoing, but again, viewing the evidence in the light again most favorable to the plaintiffs I find as a matter of law that the evidence is insufficient and there are no reasonable inferences that can be drawn from the evidence that has been produced to support the allegations set forth in ... Counts Two and Four and the second and third causes of action of plaintiff's complaint. I find that the defendants had the right to continue to insist on the production of the documents evidencing the loss and that these docu-

ments, in the main had not been provided to them. Their continuing efforts and ability to investigate were dependent upon the materials that they sought in order to better evaluate the claim and decide whether they would reconsider their May 24th, 1977 denial.

Now, if the plaintiffs were in fact as financially and emotionally distressed as they contended they were, then it was incumbent upon them to produce and submit the materials to the defendants without delay and when after all of the months had elapsed from the examination under oath, which was obviously unsatisfactory to the defendants, the plaintiffs-the defendants had not received the materials they wanted, which they felt they needed, either to dispell or to confirm either way, either to dispell, or to confirm their suspicions of arson and fraudulent loss statement, they simply decided to exercise their time rights, under the policy, they had a right to do this to protect their interest and although it seems harsh, the action does not reflect any of the egregious conduct charged against the defendants by the plaintiffs, and accordingly, for those reasons, I am granting the defendants' motions for the dismissal of Counts Two, Four and the second and third causes of action.

Furthermore, Globe failed to retract its abrupt refusal to reconsider the claim and remained disinterested in the information even after it realized that suit had been timely filed. There is no reason that this continued disinterest could not be considered by the jury as evidence bearing on the question whether Globe acted in good faith during the period leading up to the sending of the letter.[FN11]

FN11. We need not decide whether an insurer's duty of good faith continues after it receives notice that a lawsuit has been filed against it. Globe failed to display any interest in the information either during the time it believed the statute of limitations had run or after it became aware that suit had been filed before the statute ran. Even assuming arguendo that an insurance company's refusal to accept relevant information after it becomes apparent that a suit has been filed cannot be deemed a violation of its duty, its continued disinterest may constitute evidence regarding its good faith or lack thereof in its earlier dealings.

We believe that a reasonable jury could easily view the facts as sufficient evidence from which to conclude that Globe acted in bad faith, either (a) because its conduct during the last three months before denial of the reconsideration was unreasonable, (b) because it merely feigned interest in the information but had no real intention of reconsidering the claim, or (c) because it intentionally handled the application for reconsideration in a manner designed to entice Othman into losing his rights through the application of the statute of limitations.

[19] Whether Barbagelata may earlier have contributed to a delay is irrelevant. Globe has never argued that the second denial cannot be considered to have been in bad faith because of the length of the delay in obtaining the information.[FN12] More significantly, as we have already noted, *see supra* page 8, the insurer's duty of good faith is absolute and exists even if the policyholder is delinquent in meeting its obligations. The district court erred by deciding as a matter of law that Globe had not breached its duty. Whether the second ***1468** denial by Globe was in bad faith is a question that must be decided by a jury.[FN13]

FN12. Nor is it clear that the lapse of time between the initial denial of the claim and the denial of reconsideration was attributable to any unreasonable delay on Barbagelata's part. Although Barbagelata's actions seemed less than prompt, a jury could find that the time it took Barbagelata to respond to Globe's request constituted a reasonable period of time to collect the information. Because Hartwell set no specific time limit for compliance, the offer should be deemed to be in effect for a reasonable time period. *See Halstead v. Globe Hoist Co.*, 231 F.Supp. 1012, 1020 (N.D.Cal.1964) (contractual offer which is not limited in time lapses after reasonable period); *Davies v. Langin*, 203 Cal.App.2d 579, 584-85, 21 Cal.Rptr. 682, 685-86 (1962).

FN13. Othman argues various other grounds to support a finding of bad faith. We reject them all as unsupported by the record.

Othman asserts that Globe never told him that it considered him a suspect and attributes his alleged ignorance to his first attorney's youth. Any reasonable person would have understood the reason for the questions asked and the documentation requested. This argument is not credible.

Othman also argues that Globe's failure to pay his business interruption insurance while investigating the claim was in bad faith. If Othman had set the fire it would not be payable. Globe's conduct was completely reasonable in this regard.

Othman argues, lastly, that Globe's preoccupation with a passing remark by Mashni, Othman's associate, that they had been "gypped" by the "crooks" who sold them the market was in bad faith. Mashni refused to answer questions on this and Globe repeatedly asked for information on it. We, like Othman, find it difficult to understand Globe's obsession with this passing remark, but agree with Globe that Mashni's refusal to answer questions was inherently suspicious. Othman and Mashni created much of the attention focused on this remark and we do not find Globe's follow-up on it even arguably in bad faith.

V

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

[20] In order to sustain a cause of action for intentional infliction of emotional distress in California, one must show: "(1) outrageous conduct by the defendant; (2) the defendant's intention of causing or his reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Fletcher v. Western National Life Insurance Co.*, 10 Cal.App.3d 376, 394, 89 Cal.Rptr. 78, 88 (1970). Othman's claim for intentional infliction of emotional distress was properly dismissed. We need go no farther than to observe that the first element is missing in this case.

[21][22] Outrageous conduct is conduct " 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.' "*Ricard v. Pacific Indemnity Co.*, 132 Cal.App.3d 886, 895, 183 Cal.Rptr. 502, 507 (1982) (quoting *Cerventez v. J.C. Penney Co.*, 24 Cal.3d 579, 593, 595 P.2d 975, 156 Cal.Rptr. 198 (1979)). Othman has shown no evidence of conduct of this character.FN14

FN14. This does not mean, however, that damages for emotional distress are barred as an element of aggravation of damages for bad faith. *See Richardson v. Allstate Insurance Co.*, 117 Cal.App.3d 8, 172 Cal.Rptr. 423, 426 (1981). The damages, however, must be traceable to the insurer's failure to pay the claim, rather than, for example, outrage at a suggestion that Othman set the fire. *See Blake v. Aetna Life Insurance Co.*, 99 Cal.App.3d 901, 924, 160 Cal.Rptr. 528 (1979).

VI

PUNITIVE DAMAGES

[23] Under California law, punitive damages are recoverable when the defendant has been guilty of oppression, fraud, or malice. Cal.Civ.Code § 3294 (West Supp.1984). Both malice and oppression contain the concept of conscious disregard of the plaintiff's rights, a concept which is also central to the bad faith test. *Compare*Cal.Civ.Code § 3294(c)(1) & (2), *with Gruenberg,* 9 Cal.3d at 577-78, 510 P.2d at 1040, 108 Cal.Rptr. at 488. The issue of punitive damages should have gone to the jury.

VII

CONCLUSION

We affirm the district court's order granting a directed verdict on the claim of emotional distress and all bad faith claims except that based on the withdrawal of the promise to reconsider. We reverse and remand on that claim. The jury should be allowed to consider whether to award punitive damages on this issue and, if so, to determine the amount. We remand for further proceedings consistent with this opinion.

C.A.9 (Cal.),1985.
Othman v. Globe Indem. Co.
759 F.2d 1458, 2 Fed.R.Serv.3d 63

END OF DOCUMENT

EXHIBIT 6

H
Pisa v. Underwriters at Lloyd's, London
D.R.I.,1992.

United States District Court,D. Rhode Island.
Anthony PISA, Plaintiff,
v.
UNDERWRITERS AT LLOYD'S, LONDON, Defendant.
Civ. A. No. 90-0593L.

March 6, 1992.

Insured restaurant owner brought action against fire insurer, seeking to recover under policy. The parties filed cross motions for summary judgment. The District Court, Lagueux, J., held that: (1) insured's failure to provide books of account, bills, invoices, and vouchers constituted failure to perform conditions of fire policy, and (2) insured could not avoid adverse summary judgment by agreeing after oral argument on summary judgment motions to produce requested documents.

Insurer's motion granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚷2549

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2547 Hearing and Determination
170Ak2549 k. Questions to Be Decided in General. Most Cited Cases

District court declined to address issue of whether plaintiff had standing to bring, in individual capacity, suit to recover insurance proceeds under policy the beneficiary of which was plaintiff's business, where district court's decision granted summary judgment against plaintiff on merits.

[2] Federal Civil Procedure 170A ⚷2470

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)1 In General
170Ak2465 Matters Affecting Right to Judgment
170Ak2470 k. Absence of Genuine Issue of Fact in General. Most Cited Cases

Dispute over some facts does not preclude summary judgment if all facts and reasonable inferences drawn from them support judgment for moving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[3] Federal Civil Procedure 170A ⚷2543

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2543 k. Presumptions. Most Cited Cases

In determining whether to grant summary judgment, court must view record in light most favorable to party opposing motion, indulging all inferences favorable to that party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[4] Insurance 217 ⚷3173

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3173 k. Documents, Records and Information in General. Most Cited Cases
(Formerly 217k514.17(3), 217k514.18(1))

Insured restaurant owner's failure to comply with fire policy requirement that he provide insurer with access to books of account, bills, invoices, and vouchers, thereby frustrating insurer's attempt to investigate circumstances of fire, constituted failure to perform policy conditions as required to collect under policy. R.I.Gen.Laws 1956, § 27-5-3.

[5] Federal Civil Procedure 170A ⚷2546

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2546 k. Weight and Sufficiency. Most Cited Cases

Court cannot weigh credibility when making summary judgment decision. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[6] Federal Civil Procedure 170A ⚷2553

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2547 Hearing and Determination
170Ak2553 k. Time for Consideration of Motion. Most Cited Cases

Plaintiff opposing summary judgment motion must demonstrate, after adequate time for discovery, that he can establish all essential elements of his case. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[7] Insurance 217 ⚷3575

217 Insurance
217XXXI Civil Practice and Procedure
217k3572 Evidence
217k3575 k. Burden of Proof. Most Cited Cases
(Formerly 217k646)

In action on insurance policy, plaintiff must prove that he has performed conditions set forth in contract.

[8] Federal Civil Procedure 170A ⚷2461

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)1 In General
170Ak2461 k. In General. Most Cited Cases

Summary judgment motion puts end to pretrial maneuvering and compels litigants to show court what they can prove at trial; summary judgment motion gives plaintiff deadline to come forth with case and provides strict penalty of dismissal for those who cannot prove case. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[9] Federal Civil Procedure 170A ⚷2501

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 k. Insurance Cases. Most Cited Cases

Insured, having failed to cooperate and provide requested documents and information pursuant to legitimate requests by fire insurer prior to cross motions for summary judgment, could not avoid adverse summary judgment by agreeing after oral argument on cross motions to produce requested documents and information. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[10] Insurance 217 ⚷3192

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3187 Insurer's Waiver or Estoppel
217k3192 k. Nonwaiver Agreement or Reservation of Rights. Most Cited Cases
(Formerly 217k514.17(12), 217k514.20)

Fire insurer did not waive right under policy to demand information from insured where delays in scheduling insured's examination under oath were for insured's benefit and insurer explicitly reserved all rights when consenting to insured's delays.

*284 Anthony Pisa, pro se.
Stephen P. Harten, Providence, R.I., Lawrence Dugan, Morrison, Mahoney & Miller, Boston, Mass., for defendant.

MEMORANDUM AND ORDER

LAGUEUX, District Judge.

I. INTRODUCTION

[1] Anthony Pisa's tavern, the Golden Dream Restaurant, in Tiverton, Rhode Island, burned down on December 5, 1989. Pisa had insured the premises with a policy ("the Policy") from Underwriters at Lloyd's, London ("Underwriters"), which covered damage resulting from fire. Pisa brought this diversity suit [FN1] roughly one year after the fire to collect on the Policy and to seek additional compensation and punitive damages for financial loss and emotional distress allegedly resulting from Underwriters' failure to make timely payment on his claim.

FN1. Although the facts on this point are not clear, since neither side provided the Court with a complete copy of the Policy, the beneficiary of the Policy is apparently Pisa's business, New England First Corporation, not Pisa himself. Technically, Pisa may lack standing to bring this suit in his individual capacity. Nonetheless, because the Court decides to grant summary judgment against the plaintiff-be it Pisa or his company-the Court need not address this question.

Upon notification of the loss, Underwriters investigated the cause of the fire and concluded that it had started in a corner of the restaurant's basement, and that it was, as defendant's attorney explained in oral argument, "set by a human, intentional act." This case turns on Pisa's compliance with a contractual and statutory requirement that he submit to an examination under oath about the circumstances of the fire and that he produce financial records for inspection by the insurer.

Underwriters and Pisa have filed cross motions for summary judgment. For the reasons that follow, Underwriters' motion for summary judgment is granted, and Pisa's motion is denied.

II. DISCUSSION

A. *Summary Judgment Standard*

[2][3] Rule 56(c) of the Federal Rules of Civil Procedure provides the standard for ruling on a summary judgment motion:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A dispute over some facts does not preclude summary judgment if all the facts and reasonable inferences drawn from them support judgment for the moving party. *King v. Sullivan,* 776 F.Supp. 645, 649 (D.R.I.1991). The Court must view the record in the light most favorable to the party opposing the motion, indulging all inferences favorable to that party. *Id.*

B. *Analysis of Underwriters' Motion*

[4] Because the Policy is a Rhode Island contract, Rhode Island's substantive law controls this dispute. Rhode Island statute law provides for a standardized fire *285 insurance policy with mandatory provisions applying to all fire insurance policies made in the state. R.I.Gen.L. ch. 27-5 (Michie 1989). The Policy expressly included these statutory provisions (and they would be controlling here even if they had not been stated in the Policy). Pursuant to R.I.Gen.L. § 27-5-3, the Policy included the following provisions:

The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same, and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representatives, and shall permit extracts and copies thereof to be made.

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve (12) months next after inception of the loss.

These provisions give Underwriters the option and ability to investigate claims of fire damage before paying claimants. The aim of these provisions is obviously to root out insurance fraud.

Pisa cannot recover payment under the Policy unless he can show that he has performed his contractual and statutory obligations. These obligations include providing Underwriters with access to whatever books of account, bills, invoices, and vouchers that Underwriters wish to see. This duty to provide the requested information does not arise under the discovery provisions of the Federal Rules of Civil Procedure, as Pisa contends; but rather the supplying of this information is a contractual precondition to Underwriters' duty to make payment on the claim.

Pisa clearly has not complied with this requirement. Apparently suspicious of arson, Underwriters have attempted to learn about Pisa's actions on the night of the fire and examine the financial condition of Pisa's business before the fire. This is a legitimate inquiry. R.I.Gen.L. ch. 27-5 (Michie 1989). But Pisa has frustrated Underwriters at every turn.

Pisa's evasion of Underwriters' questions and requests for access to business records is astounding. On August 13, 1990, Underwriters notified Pisa that he was scheduled to submit to an examination under oath on September 12. In the same letter, Underwriters asked Pisa to bring several business records to the examination.[FN2] At Pisa's request, the date was moved to September 26. On the morning of September 26, Pisa informed Underwriters that he would not appear. Underwriters did not object, and they rescheduled the examination. After further delays, Pisa finally submitted to the examination on December 6, 1990. He brought no records with him.

FN2. Underwriters specifically requested Pisa's and his company's income tax returns for 1986-1989; all financial statements prepared for Pisa or his company between 1986 and the current date; all general ledgers; all cash disbursement journals; all monthly bank statements; all accounts payable and receivable listings; all inventory lists; all general journals; all payroll journals; all working trial balances; all transaction logs; all purchase and sales invoices for 1989; all payroll records for 1989; the fixed asset ledger; all loan documentation; copies of all canceled checks from 1989; the company's disbursement journal for 1989; all sales receipt journals, accounts receivable ledgers, and sales journals for 1988 and 1989; and a list of inventory on hand at the restaurant on December 5, 1989.

Asked about the missing business records, Pisa stated that everything but his company's checkbook had burned in the fire. Pisa Deposition, p. 48. Underwriters' attorney then questioned Pisa about his recollection of the restaurant's finances. Pisa claimed that he could not remember how much income he had reported on his 1989 federal tax return, who prepared the return, to which state he paid income taxes in 1989, who the officers and stockholders of the business were, where the corporation maintained its business office, where the restaurant kept its bank accounts, *286 whether the corporation owned any property, whether the company employed an accountant, who was responsible for payroll at the restaurant, who kept the restaurant's checkbook, what the restaurant earned or spent in an average day, or what kind of inventory the restaurant had before the fire. *Id.*at pp. 11-13, 18-25, 41-43, 46, 64-68. In short, Pisa managed to avoid giving Underwriters any information that could help them understand Pisa's finances at the time of the fire. When the examination was over, Underwriters repeated their request for any existing financial documentation, specifically made a demand for the checkbook that Pisa said had survived the fire, and asked Pisa to authorize Underwriters to obtain copies of tax returns and other financial records not in his possession. Dugan letter of Dec. 21, 1990.

More than one year later, Pisa has still not provided any of the requested documents or an authorization to obtain records. His explanation at oral argument for this noncompliance insulted the Court's intelligence. During oral argument, the Court repeatedly asked Pisa, appearing pro se, why he did not sign authorization letters giving Underwriters permission to obtain copies of his tax returns and bank statements. Pisa could not give a direct answer. Although signing an authorization letter would cost him, at most, no more than a postage stamp, Pisa claimed that the expense of obtaining the records prevented him from cooperating. Pisa is fortunate that he was not under oath when making his transparently false statements to this Court.

[5][6][7] The Court cannot weigh credibility when making a summary judgment decision. However, Pisa's failure of proof is so clear that his lack of credibility is irrelevant. Rule 56 forces Pisa to demonstrate, after adequate time for discovery, that he can establish all essential elements of his case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In an action on an insurance policy, the plaintiff must prove that he has performed the conditions set forth in the contract. *Daniel v. Pawtucket Mut. Ins. Co.,* 506 A.2d 1032, 1033-34 (R.I.1986). There is no dispute that Pisa has failed to produce information that the insurance contract requires him to provide. Consequently, he cannot prove an essential element of his case. *See Stover v. Aetna Cas. & Sur. Co.,* 658 F.Supp. 156, 159-61 (S.D.W.Va.1987). Therefore, pursuant to Rule 56, it is now time to end this litigation.

[8][9] After oral argument, Pisa filed papers making an offer to produce records and sign an authorization for financial documents. It is too late now for Pisa to start cooperating. A Rule 56 motion puts an end to pre-trial maneuvering and compels the litigants to show the Court what they can prove at trial. The rule gives the plaintiff a deadline to come forth with his case, and it provides the strict penalty of dismissal for those who cannot prove a case. Delaying the performance of his contractual obligations in the apparent hope that he would not have to disclose damaging information, Pisa has missed his chance.

[10] Finally, there is no merit in Pisa's argument that Underwriters waived their right under the Policy to demand information from him. The documents shown to this Court indicate that the several delays in scheduling Pisa's examination were for Pisa's benefit, and that Underwriters explicitly reserved all their rights when consenting to Pisa's delays. Underwriters never intentionally relinquished their known rights. *See Haxton's of Riverside, Inc. v. Windmill Realty, Inc.,* 488 A.2d 723, 725 (R.I.1985).

C. *Analysis of Pisa's Motion*

Pisa's cross motion for summary judgment obviously must be denied. As the plaintiff in this action, Pisa cannot prevail if he cannot prove all the elements of his case. He has clearly failed to perform his own contractual obligations. Since the Court grants summary judgment to the defendant, the plaintiff's motion must necessarily fail.

III. CONCLUSION AND ORDER

Accordingly, Underwriters' motion for summary judgment is granted. Pisa's motion*287 for summary judgment is denied. The clerk shall enter judgment for the defendant, forthwith. It is so ordered.

D.R.I.,1992.
Pisa v. Underwriters at Lloyd's, London
787 F.Supp. 283

END OF DOCUMENT

Stover v. Aetna Cas. and Sur. Co.
S.D.W.Va.,1987.

United States District Court, S.D. West Virginia.
Carlos W. STOVER, Plaintiff,
v.
The AETNA CASUALTY AND SURETY COMPANY, Defendant.
Civ. A. No. 2:86-1330.

April 6, 1987.

Insured brought action against insurer to recover proceeds of insurance policies. The District Court, Haden, Chief Judge, held that failure of insured to cooperate with insurer of his truck and tools was material breach of insurance contract.

Summary judgment for defendant.

West Headnotes

[1] Insurance 217 ⟹1801

217 Insurance
217XIII Contracts and Policies
217XIII(E) Estoppel and Waiver
217k1799 Estoppel of Insureds
217k1801 k. Duty to Read Policies. Most Cited Cases
(Formerly 217k155)

Insured is presumed to know terms, provisions, and conditions of his policy.

[2] Insurance 217 ⟹3204

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3203 What Constitutes Cooperation; Failure to Cooperate
217k3204 k. In General. Most Cited Cases
(Formerly 217k548)

Insurance 217 ⟹3361

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3361 k. Investigations and Inspections. Most Cited Cases
(Formerly 217k602.2(2))

Insurance 217 ⟹3206

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3203 What Constitutes Cooperation; Failure to Cooperate
217k3206 k. Providing Information in General. Most Cited Cases
(Formerly 217k548)

Insured's failure to answer questions as to financial status and his refusal to turn over income tax returns or bank statements once insurer put in issue possibility of arson, as required under cooperation clause of policies covering insured's truck and tools, and insured's institution of suit under policies two months after loss, while insurer was continuing investigation, was material breach of insurance contract, and under contract, insurer had reasonable grounds for initiating and continuing investigation.

*157 Jack W. DeBolt, Charleston, W.Va., for plaintiff.
Carl F. Stucky, Jr. and Steven P. McGowan, Steptoe & Johnson, Charleston, W.Va., for defendant.

MEMORANDUM OPINION AND ORDER

HADEN, Chief Judge.

Pending before the Court is the motion of the Defendant, Aetna Casualty and Surety Company, for summary judgment. The time for responding having passed, the Court now deems the motion mature for decision.

I. *Background*

A truck belonging to the Plaintiff, Carlos Stover, was destroyed by fire on September 7, 1986. Several tools on the truck were also destroyed. The Defendant had earlier issued insurance policies to the Plaintiff. One of the policies covered the truck and another covered the tools. The Plaintiff has sued to recover the proceeds of the policies. The Defendant moves for summary judgment claiming that the Plaintiff has breached provisions of the policies.

The policy covering the tools was issued to the Plaintiff on August 29, 1986. Among its provisions was the following:

"The Insured ... shall submit ... to examinations under oath by any person named by the Company and subscribe the same; and, as often as may be reasonably required, shall produce for examination all writings, books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representative, and shall permit extracts and copies thereof to be made."

The "business auto policy" was also issued to the Plaintiff on August 29, 1986. Among its conditions was one requiring the Plaintiff to "[c]ooperate with [the Defendant] in the investigation, settlement or defense of any claim or suit." The policy further provided that "[n]o legal action may be brought against [the Defendant] until there has been full compliance with all the terms of this policy."

Exercising its rights under the policies, the Defendant took a sworn statement from the Plaintiff on October 7, 1986. The Defendant claims that the Plaintiff's failure to answer certain questions put him in breach of the cooperation clauses referenced above. Because of their importance to the instant motion, the Defendant's questions and the Plaintiff's answers are set out below in pertinent part:

"Q Have you had any other insurance, other than with Allstate and Foremost, before you had this policy with Aetna?

A Two other times, but like I say, I can't give you the names of them because I don't know right off. I can't tell you what they are.

Q Who was your agent?

A I don't even know that. I can't tell you. Not until I go home and look, I don't know. I'm liable to tell you something that's not right.

***158** Q You have the paperwork at home on that?

A I've got some paper, yes.

Q You would be willing to give that to your attorney?

A I sure will."

Plaintiff's examination transcript at 47-48.

"Q Okay. After you left Modern Restaurant, and up to the date of the fire, had you been employed by anybody else? Did you have any other sources of income?

A Just what I've gotten out and done on my own, myself. And I don't want to get into that. That was not a company; that was just me, literally.

Q What kind of income did you have?

A Well, I done all right. I mean, you know, I don't want to get into that either because that's really-doesn't have anything to do with this here. That's me, literally, my own self. In other words, I wasn't even licensed or anything and I don't want to submit that.

Q Would you be able to provide the names of the people that you did work for and the approximate amounts?

A Some of them, maybe. I don't even want to get into that, either.

Q Why is that?

A Well, actually, I made a lot of money under the table, and that's to my advantage. I made some money that way, and I don't want to get into that.

Q I understand that, but I think part of our investigation is examining some of the financial stresses that were on you because of your testimony that you were unemployed.

A I wasn't under no distress or anything. I mean, I lived quit [sic] comfortable, my family; we don't want for anything. I mean, I'm no bum or not somebody out here starving to death. I get along."

Plaintiff examination transcript at 59-60.

As a follow-up to the Plaintiff's sworn statement, Charles Waugh, a general adjuster for the Defendant, sent a letter,[FN1] dated October 14, 1986, to Plaintiff's counsel requesting the following information and documents:

> FN1. The letter, attached as an exhibit to the affidavit of Waugh, also mentions that the Defendant had earlier informed the Plaintiff that the Defendant's investigation had revealed that the fire was intentionally set.

"1. Receipts or other evidence of purchase of tools or other materials in truck at time of fire.

2. Names of insurance companies with whom you have had insurance or insurance losses in the last ten years, including the agents from whom you purchased insurance.

3. Business records showing customers and income for your personal business.

4. Bank records showing banks and account numbers where you have had accounts over the last eighteen (18) months."

Not having received a response, Waugh sent a second letter to the Plaintiff's counsel on November 6, 1986, requesting the same items. The Plaintiff's counsel replied by letter dated November 11, 1986. Because the content of his letter is one of the few operative facts, it too is set out at length in pertinent part:

"Please be advised that Mr. Stover does not have any receipts or other evidence for the purchase of tools or other materials in the truck at the time of the fire. With respect to the balance of your request this material does not appear to me to be material that Mr. Stover is obligated to provide to you under the terms of his policy inasmuch as none of it has to do with the occurrence or cause of the loss. In the event you feel that the policy does require the production of these materials I would appreciate your advising me as to specific language upon which you rely.

***159** It would appear to me that it would now be appropriate for Mr. Stover to institute litigation with respect to this loss. In the event that you are possessed of some information regarding the loss or the cause thereof which you feel might persuade me otherwise I would appreciate the opportunity to discuss it with you before this step is taken."

The Plaintiff initiated this action on or about November 18, 1986.

II. *Discussion*

The Defendant contends that these policies contain, directly or by incorporation, the language of the 1943 New York Standard Fire Insurance Policy. The Standard Fire Insurance Policy is kept on file by the Insurance Commissioner of West Virginia and all fire insurance policies issued in the State of West Virginia must conform to its provisions. *W.Va.Code,* § 33-17-2. One particular provision of the policy requires the insured to submit upon request to an examination by the insurer, produce upon request books and records, and cooperate with the insurer in its investigation.

Despite the similarity in language of the floater policy's cooperation clause and the standard fire policy's cooperation clause, the Court notes that these policies do not, and are not required to, follow the language of the Standard Fire Insurance Policy. Admittedly, the loss in question was caused by fire, but these policies are not fire insurance policies. They are casualty insurance policies. *W.Va.Code,* §§ 33-1-10(e)(1) and (4). *W.Va.Code,* § 33-17-2, plainly states that the "Standard Fire Insurance Policy shall not be required for casualty insurance...."

Moving beyond that initial consideration, the Court notes that with regard to the floater policy (covering the tools) the distinction may not be that significant. The policy mimics in part the language of the Standard Fire Insurance Policy. Hence, though the floater policy is not required to follow the language of the Standard Fire Insurance Policy, its similarity on the significant clause allows analogies to be drawn to those cases which have addressed the Standard Fire Insurance Policy's cooperation clause. To a slightly lesser degree, this is also true for the more general cooperation clause of the business auto policy.

Cooperation clauses are commonly found in insurance policies. Their validity has become well established.

"The reason for including a cooperation clause in the policy and for conducting examinations pursuant to it is obvious enough. The company is entitled to obtain, promptly and while the information is still fresh, 'all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that [is] relevant and pertinent in such an examination [is] material, in the sense that a true answer to it [is] of the substance of the obligation of the assured.' "

Dymo-Bite, Inc. v. The Travelers Cos., 439 N.Y.S.2d 558, 80 App.Div.2d 471 (1981) (*quoting Claflin v. Commonwealth Ins. Co.,* 110 U.S. 81, 3 S.Ct. 507, 28 L.Ed. 76 (1884)).

Courts have generally viewed compliance with insurance policy provisions as a condition precedent to recovery. *See e.g. Lentini Bros. Moving & Storage Co. v. New York Property Ins. Underwriting Ass'n.,* 76 A.D.2d 759, 428 N.Y.S.2d 684 (1980), *affirmed*53 N.Y.2d 835, 440 N.Y.S.2d 174, 422 N.E.2d 819 (1981). Hence, the failure of an insured to cooperate with the insurer has been held to be a material breach of the contract and a defense to a suit on the policy. *Dymo-Bite, supra.* This is so whether the failure to cooperate is manifested by a refusal to submit to an examination under oath, *Kisting v. Westchester Fire Ins. Co.,* 290 F.Supp. 141 (W.D.Wis.1968), *affirmed*416 F.2d 967 (7th Cir.1969), or a refusal to produce documents. *Taubman v. Allied Fire Ins. Co. of Utica,* 160 F.2d 157 (4th Cir.1947). A case in point is *160*So. Guaranty Ins. Co. v. Dean,* 252 Miss. 69, 172 So.2d 553 (1965). Therein the plaintiff refused to give the insurer a copy of her income tax return or permit it to examine her checking accounts. The court held that her failure to cooperate voided the contract.

An outright refusal to submit to an examination is the easy case. Courts have also found a failure of cooperation, however, when the insured refused to answer material questions during the examination. *Robinson v. National Auto & Casualty Ins. Co.,* 132 Cal.App.2d 709, 282 P.2d 930 (1955). This is so because an insurer has a right to examine as to any matter material to its liability. *Gipps Brewing Corp. v. Central Manufacturers Mutual Ins. Co.,* 147 F.2d 6 (7th Cir.1945). Of course, the insurer is limited by a rule of reasonableness and specificity. It may not "roam at will through all of the insured's financial records." *Chavis v. State Farm Fire & Casualty Co.,* 317 N.E. 683, 346 S.E.2d 496 (1986).

[1] This is not the easy case. The Plaintiff did cooperate to an extent. He made himself available for examination. He answered the great majority of the questions posed. Nevertheless, on one area of particular concern to the Defendant, his propensity to commit arson due to financial distress, there was a failure of cooperation. The Plaintiff either made no response, or gave vague, general answers when asked about his financial status. Through his attorney, he refused to turn over his income tax returns or bank statements from previous years. Once the Defendant put in issue the possibility of arson,FN2 this information became pertinent.FN3 The Plaintiff had the contractual duty-a duty supported by public policy-to cooperate with his insurer. An insured is presumed to know the terms, provisions and conditions of his policy. *Chavis v. State Farm Fire & Casualty Co.*, 79 N.C.App. 213, 338 S.E.2d 787, 789*reversed on other grounds,*317 N.C. 683, 346 S.E.2d 496 (1986).

FN2. The Plaintiff had been informed of the Defendant's belief that the fire was intentionally set. See note 1.

FN3. "[T]he financial condition of the insured is a relevant matter of inquiry to an insurer suspecting arson." *Chavis, supra,* at 346 S.E.2d 498.

The sphere of the Plaintiff's failure to cooperate here was greater in importance than it bore to the volume of material covered. That a stressed financial condition may provide the motive for arson is well recognized. It may be a key component of what is often a circumstantial case.

[2] One manifestation of the Plaintiff's failure to cooperate with the Defendant was his filing of suit two months after the loss. Now, the Court realizes that two months can seem like a great amount of time to someone who has suffered a financial loss, especially a business loss. And the Court is not unmindful of the frustration which sometimes attends dealings with insurance companies. Nevertheless, public policy dictates that an insurance company be given a reasonable time to complete its investigation. In certain instances, a deliberate and thorough investigation can prevent needless litigation. Such an investigation also promotes society's interest in limiting coverage to those who have sustained legitimate losses.

Likewise, two months may seem an unreasonably lengthy period of time for investigation of a relatively small incident. The Court, however, in the context of this case, does not find it to be unreasonable. In the often slow-moving worlds of business and law, it cannot be said that the Defendant's pace was abnormally slow. It examined the Plaintiff exactly one month after the fire. Undoubtedly, its investigative machinery had been put in gear sometime before then. Following the examination by one week was a letter to the Plaintiff's counsel by Charles Waugh, a general adjuster for the Defendant. Waugh asked in part for documents which the Plaintiff, in his examination, had promised to provide. Having received no reply to his letter, Waugh sent a second letter to the Plaintiff's counsel on November 6, 1986. The letter reply of Plaintiff's counsel was *161 dated November 11, 1986. It did not reach the Defendant, however, until November 17, 1986. Although counsel for the Plaintiff appeared to indicate that his position on the requested documents was flexible, this action was initiated on November 18, 1986, the day after the Defendant received counsel's reply.

It must be kept in mind that the Defendant had not repudiated the policies at the time this action was initiated. At no time did the Defendant refuse or deny coverage. Its investigation was continuing. The Defendant kept the Plaintiff apprised of its ongoing investigation. Moreover, in his first letter to the Plaintiff and his counsel, Waugh emphasized that the Defendant had not denied coverage under either policy. In this vein, it has been held that an insured cannot "insulate itself against cooperation by commencing an action before there has in fact been repudiation of liability by the insurer...." *Lentini Bros. Moving & Storage Co. v. New York Prop-*

erty Ins. Underwriting Association, 53 N.Y.2d 835, 440 N.Y.S.2d 174, 175, 422 N.E.2d 819, 820 (1981). Moreover, the business auto policy stated that no legal action could be brought until there had been full compliance with the terms of the policy.

III. *Conclusion*

Based on the foregoing, the Court concludes that the Defendant had reasonable grounds for initiating and continuing an investigation.[FN4] The Court also concludes that the Plaintiff materially breached the insurance contract when he failed to fully cooperate with his insurer. Accordingly, the Court will enter summary judgment in favor of the Defendant.

FN4. The Defendant has isolated, without contradiction, no fewer than six facts which influenced its decision to pursue an investigation:

"(a) The plaintiff-insured had just started the business in which the truck and tools destroyed in the fire were to be used (Stover examination at 6-7) and the business had never advertised or developed; (Stover examination at 10);

(b) The plaintiff-insured had been self-employed or unemployed for two years prior to the fire and had limited resources (Stover examination at 8; 56);

(c) The circumstances surrounding the plaintiff-insured's loss were largely unconfirmable (Stover examination at 10-23);

(d) The plaintiff-insured had suffered several other insurance losses within the five (5) years prior to the loss at issue (Stover examination at 48-54);

(e) The plaintiff-insured refused to detail his sources of income for the year prior to the loss (Stover examination at 58-60);

(f) The plaintiff-insured paid $3,100.00 cash for the subject truck and over $5,000.00 cash for tools in a twelve-month period prior to the loss (Stover examination at 42, 67)."

Defendant's memorandum at 3-4.

S.D.W.Va.,1987.
Stover v. Aetna Cas. and Sur. Co.
658 F.Supp. 156

END OF DOCUMENT

EXHIBIT 8

C

Supreme Court, Appellate Division, Second Department, New York.
Moshe AVERBUCH, Respondent,
v.
The HOME INSURANCE COMPANY, a Stock Company, Appellant.

Nov. 4, 1985.

Insured brought action to recover under fire policy. The Supreme Court, Suffolk County, Corso, J., conditionally granted insurer's motion for summary judgment unless insured supplied insurer with documents. Insurer appealed. The Supreme Court, Appellate Division, held that insured's pattern of noncooperation with insurer after loss for which no reasonable excuse was proffered constituted breach of substantial conditions of the fire policy, precluding recovery by insured.

Reversed; complaint dismissed.

West Headnotes

Insurance ⚿3171
217k3171 Most Cited Cases
(Formerly 217k548)

Insurance ⚿3173
217k3173 Most Cited Cases
(Formerly 217k548)
Insured's pattern of noncooperation with fire insurer after loss for which no reasonable excuse was proffered, including willful refusal to answer material questions on examination under oath by insurer and to supply material and relevant documentation, constituted breach of substantial conditions of the policy and precluded recovery.
**738 Donald J. Feldman, Mineola, for appellant.

Before MANGANO, J.P., and THOMPSON, BROWN and EIBER, JJ.

MEMORANDUM BY THE COURT.

In an action to recover on a fire insurance policy, defendant appeals from so **739 much of an order of the Supreme Court, Suffolk County (Corso, J.), dated October 5, 1984, as only conditionally granted that branch of its motion which was for summary judgment unless plaintiff furnished defendant with certain documents within 30 days of receipt of the order, with notice of entry.

Order reversed insofar as appealed from, on the law, with costs, by deleting therefrom the provision which only conditionally granted that branch of defendant's motion which was for summary judgment and substituting therefor a provision granting that branch of defendant's motion unconditionally and dismissing the complaint.

The instant action was commenced by plaintiff to recover on a fire insurance policy which covered premises owned by him in Bellport, Suffolk County. The premises were damaged by two separate fires which occurred in June 1983.

*828 The fire insurance policy issued to plaintiff provided in pertinent part as follows:

> "4. Your Duties After Loss. In a case of a loss to which this insurance may apply, you shall see that the following duties are performed
>
> * * *
>
> "d. as often as we reasonably require: (1) exhibit the damaged property; (2) provide us with records and documents we request and permit us to make copies; and (3) submit to examination under oath and subscribe the same."

After a preliminary investigation by the defendant insurer disclosed that the fires in June 1983 were incendiary in nature, plaintiff appeared for an examination under oath conducted by the defendant on November 22, 1983. Despite being warned by defendant's attorney that a refusal to answer material and relevant questions might lead to a disclaimer

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

under the policy by the defendant, plaintiff refused to answer several patently material questions posed by defendant's counsel including, *inter alia*, questions relating to the condition of the premises prior to the fires and plaintiff's financial status at that time. Despite two subsequent warning letters sent by defendant's counsel to plaintiff's counsel in December 1983 and January 1984, plaintiff (1) continued in his refusal to supply the answers to these material questions and (2) also failed to supply, in contrast to his promises at the examination under oath, an itemized list of expenditures alleged to have been made on the premises, along with any available documentation thereof.

Shortly thereafter the instant action was commenced, and after joinder of issue, defendant moved, *inter alia*, for summary judgment based on plaintiff's failure and refusal to answer material questions at his examination under oath, and to supply defendant with material information and documentation.

Special Term granted that branch of defendant's motion which was for summary judgment unless plaintiff supplied defendant with the following documents:

> "1. An itemized list of all work done to the building during the initial period after Mr. Averbuch acquired it and the amount that was spent for each particular item.
> "2. Copies of any available receipts, invoices or other documentation concerning work done to the building during the initial period.
> ***829** "3. A copy of Mr. Averbuch's 1982 Federal Income Tax return."

In our view, the branch of defendant's motion which was for summary judgment should have been granted unconditionally.

The record herein demonstrates a pattern of noncooperation with the insurer for which no reasonable excuse was proffered. Under these circumstances, the plaintiff's willful refusal to answer material and relevant questions on his examination under oath by defendant and to supply material and relevant documentation constituted a breach of substantial conditions of the policy (*see, Hallas v. North Riv. Ins. Co.*, 279 App.Div. 15, 16, 107 N.Y.S.2d 359, *affd.* 304 N.Y. 671, 107 N.E.2d 592; *accord Dyno-Bite, Inc. v. Travelers Cos.*, 80 A.D.2d 471, 473, 439 N.Y.S.2d 558; ****740** *Williams v. American Home Assur. Co.*, 97 A.D.2d 707, 468 N.Y.S.2d 341, *affd.* 62 N.Y.2d 953, 479 N.Y.S.2d 216, 468 N.E.2d 54).

Accordingly, that branch of the defendant's motion which was for summary judgment should have been granted unconditionally (*Williams v. American Home Assur. Co., supra; Lentini Bros. Moving & Stor. Co. v. New York Prop. Ins. Underwriting Assn.*, 53 N.Y.2d 835, 440 N.Y.S.2d 174, 422 N.E.2d 819).

114 A.D.2d 827, 494 N.Y.S.2d 738

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Thompson v. State Farm Fire and Cas. Co.
C.A.10 (Okl.),1994.

United States Court of Appeals,Tenth Circuit.
E.G. THOMPSON and Betty Thompson, Plaintiffs-Appellants,
v.
STATE FARM FIRE AND CASUALTY COMPANY, Defendant-Appellee.
No. 93-7054.

Aug. 9, 1994.

Insureds brought action to recover proceeds of fire insurance policy and to collect other damages stemming from insurer's conduct in handling their claim. The United States District Court for the Eastern District of Oklahoma, Frank Howell Seay, Chief Judge, entered judgment for insurer, and insureds appealed. The Court of Appeals, Shadur, Senior District Judge, sitting by designation, held that: (1) jury was properly instructed on fraud; (2) evidence that insured suffered from epileptic seizures and took medication for that condition was excludable; (3) testimony regarding fire's point of origin was irrelevant; (4) charged conduct of insured was not sufficiently extreme and outrageous to permit recovery for intentional infliction of emotional distress; and (5) limiting each side's closing argument to 20 minutes was not abuse of discretion.

Affirmed.

West Headnotes

[1] Federal Courts 170B 373

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(A) In General
170Bk373 k. Substance or Procedure; Determinativeness. Most Cited Cases

Federal Courts 170B 433

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk433 k. Other Particular Matters. Most Cited Cases

In diversity case substantive correctness of jury instruction is matter of state law, but question of whether error is harmless is one of federal law.

[2] Insurance 217 3579

217 Insurance
217XXXI Civil Practice and Procedure
217k3579 k. Instructions. Most Cited Cases
(Formerly 217k669.4(2))

Under Oklahoma law, insureds seeking to recover proceeds of fire insurance policy and other damages, over insurer's defense that policy was void due to insureds' fraud, were not entitled to have jury instructed on law of fraudulent statements as to future intentions and representations, in addition to conventional fraud stemming from misrepresentations as to past or present facts, where fraud claim was based upon insureds' allegedly false statements to investigator that sales of insureds' jewelry store business and stock in mining company were imminent, but there was no evidence that insureds had no present intention to proceed with any sales that might develop. 36 Okl.St.Ann. § 4803, subds. A, B, G.

[3] Fraud 184 12

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k8 Fraudulent Representations
184k12 k. Existing Facts or Expectations or Promises. Most Cited Cases

Under Oklahoma law, because fraud based on statements as to future intentions and representations and conventional fraud stemming from misrepresentations as to past or present facts are analytically distinct, the existence of one does not require the presence of the other.

[4] Insurance 217 ⚷3579

217 Insurance
217XXXI Civil Practice and Procedure
217k3579 k. Instructions. Most Cited Cases
(Formerly 217k669.7(1))

Under Oklahoma law, in insureds' suit to recover proceeds of fire insurance policy, district court did not abuse its discretion in declining to give requested instruction on provisions of Oklahoma Unfair Settlement Practices Act, which instruction was offered only to demonstrate normative behavior, because of the lack of any private right of action under the Act; instruction was offered to complement standard that jury could readily apply on its own. 36 Okl.St.Ann. §§ 1221-1228.

[5] Federal Courts 170B ⚷823

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk823 k. Reception of Evidence. Most Cited Cases

Where judge excludes evidence and offering party has interposed proper objection at trial, reviewing court will reverse only if exclusion is abuse of discretion that results in manifest injustice to parties.

[6] Evidence 157 ⚷146

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

Evidence of insured's epileptic seizure suffered as result of fall and of medication he took for such seizures, offered to boost insured's credibility by explaining why, during cross-examination, he was unable to recall earlier statements and deposition testimony, was excludable from suit on fire insurance policy on ground that its probative value was outweighed by potential for unfair prejudice in appealing to jury's sympathy. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[7] Federal Courts 170B ⚷820

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk820 k. Depositions and Discovery. Most Cited Cases

Exclusion of expert witness whose name had been omitted from witness lists could not have resulted in manifest injustice to offering party in light of ruling excluding, as unfairly prejudicial, party's testimony on same subject.

[8] Federal Courts 170B ⚷820

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk820 k. Depositions and Discovery. Most Cited Cases

Exclusion of witness not listed as required by pretrial order is reviewed for abuse of discretion.

[9] Insurance 217 ⚷2200

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2200 k. Admissibility. Most Cited Cases
(Formerly 217k429.1(2))

Expert testimony regarding fire's point of origin in building was irrelevant to fire insurer's duty to make good faith assessment of insureds' claim of loss, in light of stipulation that fire was incendiary in origin and had been set intentionally; once insurer established that incendiary fire had destroyed building, all that was directly relevant to its investigation was who set it.

[10] Evidence 157 ⚷515

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony

157k515 k. Conduct of Business. Most Cited Cases

Expert testimony on industry standards and state law for investigation of insurance claims was excludable from action to recover proceeds of fire insurance policy; jury was competent to deal with bad faith issue on its own, and that proffered testimony would not even marginally assist trier of fact, so it was not proper subject of expert testimony and its admission would be unduly prejudicial. Fed.Rules Evid.Rules 403, 702, 28 U.S.C.A.

[11] Damages 115 🔑57.45

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.44 Insurance Practices
115k57.45 k. In General. Most Cited Cases
(Formerly 115k56.10)

Damages 115 🔑57.46

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.44 Insurance Practices
115k57.46 k. Claims and Settlement; Bad Faith. Most Cited Cases
(Formerly 115k56.10)

Under Oklahoma law, claimed conduct of fire insurer in its investigation of claim and in its cancellation of policy based upon material evidence that insureds had started fire being investigated did not amount to extreme and outrageous behavior necessary to support claim of intentional infliction of emotional distress. Restatement (Second) of Torts § 46.

[12] Federal Courts 170B 🔑764

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk764 k. Taking Case from Jury. Most Cited Cases

Federal Courts 170B 🔑776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Reviewing court stands in shoes of trial court when passing on its grant of motion for judgment as matter of law; that is, it reviews that decision de novo and applies same legal standards as did trial judge. Fed.Rules Civ.Proc.Rule 50(a)(1), 28 U.S.C.A.

[13] Federal Civil Procedure 170A 🔑2142.1

170A Federal Civil Procedure
170AXV Trial
170AXV(F) Taking Case or Question from Jury
170AXV(F)2 Questions for Jury
170Ak2142 Weight and Sufficiency of Evidence
170Ak2142.1 k. In General. Most Cited Cases

Judgment as matter of law is appropriate only where, with reasonable inferences from evidence drawn in nonmovant's favor, jury verdict in its favor would be improper. Fed.Rules Civ.Proc.Rule 50(a)(1), 28 U.S.C.A.

[14] Damages 115 🔑57.22

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage
115k57.22 k. Nature of Conduct. Most Cited Cases
(Formerly 115k50.10)
Under Oklahoma law, mere unreasonableness of behavior will not suffice to support claim of intentional infliction of emotional distress; rather, defendant's conduct must be beyond all possible bounds of decency in setting in which it occurred, or utterly intolerable in civilized community.

[15] Damages 115 ⚷57.22

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage
115k57.22 k. Nature of Conduct. Most Cited Cases
(Formerly 115k50.10)
Under Oklahoma law, even if severe emotional distress exists, absence of extreme and outrageous behavior precludes recovery for intentional infliction of emotional distress as matter of law.

[16] Insurance 217 ⚷3336

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3336 k. Reasonableness of Insurer's Conduct in General. Most Cited Cases
(Formerly 217k602.2(2))
Under Oklahoma law, evidence supporting fire insurer's legitimate belief that it had no obligation to honor claim foreclosed any award of punitive damages to insureds.

[17] Federal Courts 170B ⚷907

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk907 k. Submission of Questions or Interrogatories to Jury. Most Cited Cases
Insureds seeking recovery under fire insurance policy and other damages were not prejudiced by district court's failure to submit to jury claim of intentional infliction of emotional distress and claim for punitive damages, in light of jury's determination that insurer did not act in bad faith in its investigation and denial of claim, which finding made it legally impossible for jury either to award punitive damages or to find intentional infliction of emotional distress.

[18] Federal Courts 170B ⚷822

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk822 k. Conduct of Trial in General. Most Cited Cases
Decisions affecting time allocated for closing argument will be reversed only for abuse of discretion.

[19] Federal Courts 170B ⚷905

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk905 k. Argument and Conduct of Counsel. Most Cited Cases
Plaintiffs were not prejudiced by decision limiting each party's closing argument to 20 minutes, absent any showing of what their lawyer would have done differently if he had more time or how counsel would have been better able to alleviate alleged jury confusion and obtain favorable verdict.

[20] Federal Courts 170B ⚷635

170B Federal Courts

170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk635 k. Necessity of Timely Objection or Exception. Most Cited Cases

Insureds' claim that jury verdict was inconsistent, because jury found that insureds were not responsible for setting fire to insured property and did not thereby violate intentional acts provision of fire insurance policy, but that insureds violated concealment or fraud provision of policy by lying about imminent sale of their jewelry business or their stock in mining company, was waived by their failure to present argument before dismissal of jury.

[21] Federal Courts 170B ⚷633

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk633 k. Verdict or Findings. Most Cited Cases

Jury verdict finding that insureds were not responsible for setting fire to insured property and did not thereby violate intentional acts provision of fire insurance policy, but that insureds violated concealment or fraud provision of policy by lying about imminent sale of their jewelry business or their stock in mining company, was not inconsistent on its face, such that entry of judgment on verdict was plain error, though insureds maintained that if they did not set fire they had no reason not to be entirely truthful in information they provided to insurer; whatever insureds' motives may have been, jury was entitled to find entirely compelling the evidence that they gave materially false and misleading answers to insurer's investigator.

*934 Harry Scoufos,Law Offices of Harry Scoufos, P.C., Sallisaw, Oklahoma (Harvey L. Chaffin, Tahlequah, OK with him on the brief), for plaintiffs-appellants.

Jerry Fraley (Allison Herzfeld with him on the brief), of Cathcart, Gofton & Fraley, Oklahoma City, OK, for defendant-appellee.

Before BALDOCK, Circuit Judge and EBEL, Circuit Judge and SHADUR, Senior District Judge FN*.

FN* The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

SHADUR, Senior District Judge.

E.G. Thompson ("E.G.") and his wife Betty ("Betty"), collectively "Thompsons," sued State Farm Fire & Casualty Company ("State Farm") to collect the proceeds of an insurance policy ("Policy") covering a building that had been destroyed by fire and to collect other damages stemming from State Farm's conduct in handling Thompsons' claim. At the conclusion of the jury trial a verdict was returned in State Farm's favor. Thompsons appeal on several grounds, all of which we conclude are without merit.

Thompsons' arguments seeking a new trial can be grouped into five general categories. *935 Four of those relate to rulings by the district judge:

1. her refusal to include among the jury instructions:

(a) Oklahoma Uniform Jury Instructions-Civil ("OUJI") No. 17.7 and 17.8 (1982) and

(b) an instruction reflecting provisions of the Oklahoma Unfair Settlement Practices Act (the "Act"), Okla.Stat.Ann. tit. 36, §§ 1221-1228 (West 1994);

2. her evidentiary rulings as to proposed testimony:

(a) on E.G.'s medical condition (including proposed testimony by an expert on that issue),

(b) on the fire's point of origin and

(c) by an expert on the issue of unfair settlement practices;

3. her grant of a judgment as a matter of law dismissing Thompsons' claim of intentional infliction of emotional distress, and her refusal to submit the issue of punitive

damages to the jury; and

4. her restriction of closing argument to 20 minutes for each side;

while the last claimed ground stems from the jury's allegedly inconsistent answers to interrogatories in the verdict form.

Facts FN1

FN1. What follows in this section will suffice for discussion of most of the issues. To the extent that added facts are needed in connection with any of the substantive discussion, they will be set out in later sections.

On the night of June 6, 1991 a house that Thompsons owned and had rented out, but that had been unoccupied during the preceding week after the tenants moved out, was destroyed in a fire that the parties have stipulated was set intentionally. Thompsons were at home when the fire started, and the insured property was only a short walk down a path from the Thompsons' own residence.

After Thompsons put in a claim under the Policy covering the building, its contents and the loss of rental value, State Farm sent claim representative Morty Sands ("Sands") to review Thompsons' financial condition in order to determine whether they had a motive to set the fire. As part of that investigation Thompsons gave examinations under oath on September 11, 1991 as required by the Policy.

During that examination Thompsons told Sands that the sale of their Tah-Mels Jewelry Store business ("Tah-Mels") for $700,000 to $750,000 "was imminent." Sands then took a recorded statement from the realtor with whom Tah-Mels was listed for sale, Helen Morris ("Morris"), who not only negated any "imminent" sale but said that "there had been no offers made, and no serious lookers."

At trial Betty confirmed that during the September 1991 examination she had stated under oath that Tah-Mels would sell in a week for $700,000, that "these were very serious buyers, and the sale had been planned for some three months before that date." E.G. testified at trial that at the time he spoke to State Farm he believed a sale of Tah-Mels was "impending" because Morris had told him she had the business sold for $750,000 and "The deal is going to go through." But he said that Morris "killed the sale" shortly after Thompsons had given their September 1991 statements to Sands. Thompsons ascribed the killing of the purported sale to Morris' having made direct contact with Orville Munson ("Munson"), the owner of the Tah-Mels real estate (but not of the business).

Munson testified at trial that he had sold the Tah-Mels business to Thompsons in 1984 but had retained the land and building in which the business was conducted. Thompsons had an option to buy that real estate for $116,000, so that if they sold it for a greater amount they could keep the difference.

For her part, Morris testified that she listed Tah-Mels and the real estate for sale from November 8, 1990 through October 1992, listing the building alone for $275,000 and the entire property plus the business inventory for $775,000. She denied ever having told Thompsons that she "had a buyer willing to pay $700,000 to $750,000 for the store." Instead she testified that during the two years she had attempted to sell the *936 property, the first and only offer she ever had was a $90,000 offer for the real estate from the Cherokee Nation in October *1992* (fully a year after Thompsons' September 1991 statements to the State Farm representative). When Thompsons then made a counter demand of $250,000, Morris found the Cherokee Nation totally unreceptive to that price (they had obtained an appraisal that valued the property at $150,000). Morris then inquired of the tax assessor as to the valuation for tax purposes and learned for the first time that Thompsons did not own the property-Munson and his wife did. Morris then spoke with Munson to see if he was interested in the Cherokee Nation offer. In any event, no sale ultimately went through.

During Sands' investigation Thompsons also told her of another supposedly "imminent" sale, this one involving the sale of their stock in Honduran Gold Mines, Ltd. ("Honduran") to a "Japanese concern" for $3.5 million. Thompsons asked Sands not to communicate with either the purchaser or Honduran's officials for fear of ruining the sale. Later Thompsons' lawyer gave Sands a telephone number for the company, but the number was no longer in service. Then Sands investigated further and found the place where Honduran had previously been located-an office in a shopping center-but was unable to find any current location for the company.

E.G. testified at trial that he had told State Farm during the September 11, 1991 examination that he owned 6 million shares of Honduran stock (about 5% of the company) and that he believed an investor "was about to pump several million dollars into the company." FN2 Betty confirmed that during the September 11, 1991 examination she had said that a sale of the stock would take place within 90 days and that Thompsons had gone to Dallas and visited Honduran President Jerry Griffin ("Griffin") on June 5, 1991 (the day before the fire). Griffin's deposition (read into evidence in part during the trial) reflected that Thompsons had shown up uninvited and without notice on that date, and that he then told Thompsons that two offers to purchase part of Honduran had been rejected (Thompsons were generally familiar with the company's affairs, both being members of its Board of Directors). However, Griffin's deposition confirmed his belief at the time of the June 5 visit that an infusion of cash was likely because of the interest of still another party. Munson also testified that he owned some stock in Honduran and that as of June 1991 he "thought sure that there was a sale," though none had taken place then. Indeed the record reflects that no such sale had occurred since then either.

FN2. When E.G. had been examined under oath during January 1992 in an unrelated lawsuit, he had testified that he had sold that stock 2 1/2 years earlier (fully two years before his September 1991 statement to State Farm). After the information about his earlier wholly inconsistent statement had been elicited during his cross-examination at the current trial, he testified during redirect examination by his own counsel that he (or perhaps he and Betty) had always owned and possessed the Honduran shares and still did (though he would not dispute the possibility that at one time the shares could have been transferred to the Tallyho Corporation, a company that he and Betty formed in June 1991). Despite the efforts of Thompsons' counsel to paper over the differences between the inconsistent versions to which E.G. had sworn at different times, by definition no possible transfer to Tallyho could explain away a testified-to sale of the Honduran stock two years before Tallyho ever came into existence. In any event, E.G.'s contradictory versions were part of the factual matrix available to the jury in evaluating his credibility and the materiality of Thompsons' misrepresentations.

Jury Instructions

[1] In deciding a challenge to jury instructions on appeal (*Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1424 (10th Cir.1993)):

this court examines the record as a whole to determine whether the instructions state the applicable law and provide the jury with an appropriate understanding of the issues and legal standards to apply.

Even where an instruction is erroneous, we will reverse "only if the error is determined to have been prejudicial after reviewing the record as a whole" (*Brown v. Wal-Mart Stores, Inc.*, 11 F.3d 1559, 1564 (10th Cir.1993)). In a diversity case such as this the substantive correctness of a jury instruction *937 is a matter of state law, "but the question of whether error is harmless is one of federal law" (*Hinds v. General Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir.1993)).

1. *Oklahoma Law of Fraud*

[2] Thompsons argue that the magistrate judge improperly instructed the jury on the applicable law of fraud, given the evidence adduced at trial. In that respect Ok-

lahoma requires that the following provision (Okla.Stat.Ann. tit. 36, § 4803.G (West 1994)) be included in every fire insurance policy (*id.* § 4803.A and .B):

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Although the record before us does not include a copy of the Policy itself, the litigants have proceeded as though the Policy contains that provision, and we will so assume.

Here is the jury instruction given by the district judge in that respect:

Defendant has asserted the claim that the plaintiffs violated the concealment or fraud conditions of the policy. In order to prevail on this claim, defendant must prove each of the following elements. First: that the policy in force and effect contained a concealment or fraud provision.

Second, that the plaintiffs breached this provision; third, this breach was willful, and that the concealment of information was [a] misrepresentation of information made with the intent to defraud or deceive.

If you find that the defendant has proven that the plaintiffs violated the concealment or fraud provision in the presentation of the claim, then you must find for defendant, and against the plaintiffs, on their claim under the policy. Defendant only needs to prove that the plaintiffs intentionally concealed or misrepresented a material fact relating to the insurance policy. It is not necessary that defendant actually have been misled by the plaintiffs' alleged misrepresentation in order for defendant to prevail on the concealment and fraud defense.

A fact is material if a reasonably, careful person, under the circumstances, would attach importance to it, in determining his course of action, or if the person stating it knows, or a person conceals it, knowing that the person with whom he is dealing, will very likely regard [it] as important in determining his course of action.

Thompsons contend that because they believed the sale of their Honduran stock and the Tah-Mels business were imminent when they spoke to State Farm, but those sales did not in fact take place, the jury should have been instructed on the law of fraudulent statements as to future intentions and representations. For that purpose Thompsons tendered instructions based on OUJI Nos. 17.7 and 17.8, which read: FN3

FN3. Unfortunately another of the gaps in the partial record that has been provided to us by the parties is the text of the actual instructions submitted by Thompsons. But as the ensuing discussion reflects, the rejection of Thompsons' position does not at all hinge on the particular language involved.

Statements of Future Intentions or Promises: The failure of a person (to perform a promised future act) (to carry out a stated intention) does not constitute a false representation of a past or present fact unless at the time he (made the promise) (stated his intention) he did not then intend to (perform the promise) (carry out the stated intention) and he (made the promise) (stated his intention) with the intent to deceive the promisee into acting when he otherwise would not have done so.

Statements About the Future as False Representations: To constitute actionable fraud, false representations must generally relate to present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve matters that (may) (may not) occur in the future. However, if a promise about the future is made with an intention not to perform it, and is made for the purpose of deceiving the person to whom it was made, *938 and inducing him to act, such actions constitute fraud.

According to Thompsons, the district judge's failure to give those added instructions confused the jury as to the applicable legal standard, resulting in reversible error.

As the ensuing discussion demonstrates, however, that assertion discloses a basic misunderstanding on Thompsons' part and not on the part of the district judge.

[3] *Citation Co. Realtors, Inc. v. Lyon,* 610 P.2d 788, 790 (Okla.1980) reflects the familiar distinction between fraudulent statements as to future intentions or representations and conventional fraud stemming from misrepresentations as to past or present facts:

Oklahoma follows the view that fraud can be predicated upon a promise to do a thing in the future when the intent of the promisor is otherwise. This principle is an exception to the general rule that for a false representation to be the basis of fraud, such representation must be relative to existing facts or those which previously existed, and not as to promises as to future acts. As stated in *Blackburn v. Morrison,* 29 Okl. 510, 118 P. 402 (1910), the exception to the general rule obtains where the promise to act in the future is accompanied by an intention not to perform and the promise is made with the intent to deceive the promisee into acting where he otherwise would not have done so.

Accord, *Furr v. Thomas,* 817 P.2d 1268, 1272 (Okla.1991); *Hall v. Edge,* 782 P.2d 122, 128 n. 4 (Okla.1989). As to what the Oklahoma Supreme Court has identified as "the exception to the general rule," it rests on the notion that at the time someone made a statement regarding some future event over whose occurrence the speaker had some control, the speaker's *subjective* intent was not to bring that event to fruition (*Tice v. Tice,* 672 P.2d 1168, 1171 (Okla.1983) ("Fraud can be predicated upon a promise to do a thing in the future when the promisor's intent is otherwise."); cf. *Rajala v. Allied Corp.,* 919 F.2d 610, 631-32 (10th Cir.1990) (Kansas law); *Mackey v. Burke,* 751 F.2d 322, 328 (10th Cir.1984) (same)). In that respect it is wholly irrelevant that the statement included no falsity as to any other present or past facts-things that could be shown to be false in *objective* terms (as would be present in a typical instance of such more conventional fraud, as in *Varn v. Maloney,* 516 P.2d 1328, 1332 (Okla.1973)). It is of course possible that a specific situation may implicate both forms of fraud, but because they are analytically distinct the existence of one does not require the presence of the other.

Thompsons' argument seeks to gloss over the natural import of their statements concerning the assertedly "imminent" sales of their Tah-Mels business and Honduran stock. In each instance what was material was whether those statements of imminency were themselves true when made, not whether such sales were later realized (or, as in the exception expressed in *Citation Realtors* and like cases, whether Thompsons presently intended that they would go through with such a sale if it became a reality). After all, the relevancy of the statements to State Farm's investigation was in showing that Thompsons owned assets that had sufficient value and had a sufficient prospect of early realization to negate the inference that they had a financial incentive to burn their own building. And as such, the statements were material to the extent that they reflected or did not reflect *present* facts, not Thompsons' *future* intentions.

From that perspective the jury was surely entitled to conclude (an understatement if there ever was one) that as of the time of Thompsons' September 11, 1991 examination there was no party interested in buying the Tah-Mels business and the real estate in which it was carried on for any amount, let alone for the $700,000 to $750,000 that Thompsons recounted to Sands. If the jury so decided, Thompsons' assertion of the purportedly imminent sale was surely an overt misrepresentation as to present facts.

As for the Honduran stock, although there was evidence apart from E.G.'s own statement that would support the notion that as of the time of the fire or as of the time of Thompsons' September 11, 1991 statements an infusion of substantial cash might possibly be in the offing, the jury could more than reasonably determine that Thompsons' more *939 positive and precise representations to Sands-their statements as to a totally nonexistent "imminent" sale to a "Japanese concern" for $3.5 million-were without factual support. And a rational jury could even independently view E.G.'s statement about having sold the stock in 1989 as negating the idea that Thompsons had anything to sell in 1991 to begin with. In either or both of those instances, as with the Tah-Mels situation, the material representations were of *present* facts and not of *future* intentions.

All of that being so, it was entirely proper for the district judge to have instructed the jury in terms of conventional fraud (a matter that Thompsons do not challenge as such, and on which the jury instruction followed established Oklahoma law). As for Thompsons' notion that an added instruction dealing with fraud as to their future intentions was needed for clarification, no such instruction was appropriate absent evidence that the Thompsons, at the time they made their statements to Sands, had no present intention to proceed with any sales that might develop. Because any such evidence was lacking, it would have been wholly inappropriate to go to the jury with that legal rule (*Rajala,* 919 F.2d at 632; *Mackey,* 751 F.2d at 328-29). Indeed, we can think of nothing more likely to confuse a jury that has already been provided with a clear and correct instruction of the law than to be given still another instruction that has some similarities to and some differences from the first instruction, but that is without any appropriate factual anchor in the evidence that the jury has heard.

2. *Instruction Based on the Act*

[4] Thompsons also complain of the district judge's refusal to instruct the jury in the verbatim language of the Act, even though they acknowledge that the statute does not create a private right of action (*Gianfillippo v. Northland Casualty Co.,* 861 P.2d 308, 310 (Okla.1993), following *Walker v. Chouteau Lime Co.,* 849 P.2d 1085, 1086-87 (Okla.1993)). As Thompsons would have it, such an instruction should have been given because "[t]he act sets standards for normative behavior of insurance companies by which good faith and bad faith may be judged."

Here the jury was already instructed as to the implied covenant of good faith built into every insurance contract, so that State Farm would become liable for any detriment proximately caused by any actions on its part that were unreasonable and in bad faith. State Farm's duty was expressly described as one requiring it "to deal fairly and in good faith" with Thompsons. Given the fact that the Oklahoma Supreme Court squarely negates the Act as a source of recovery and the principle that jurors may properly be viewed as capable of evaluating good and bad faith (just as they regularly determine what constitutes the conduct of a "reasonable" person) by bringing their own common sense and life experience to bear, we view it as well within the district judge's discretion to have refused an added instruction offered only to demonstrate normative behavior-and thus offered to complement a standard that the jury could readily apply on its own.[FN4]

FN4. It is worth noting as well that the instruction that was tendered by Thompsons' counsel would itself have been a source of confusion, because its parroting of Okla.Stat.Ann. tit. 36, § 1222 (West 1994) referred to so many insurance company practices that were totally irrelevant to this case.

Evidentiary Rulings

[5] Where a trial judge excludes evidence and the offering party has interposed a proper objection at trial, we will reverse only if the exclusion is an abuse of discretion that results in "manifest injustice to the parties" (*Angelo v. Armstrong World Indus., Inc.,* 11 F.3d 957, 960 (10th Cir.1993), quoting *Comcoa, Inc. v. NEC Tels., Inc.,* 931 F.2d 655, 663 (10th Cir.1991)). Again Thompsons fail that test in each instance.

1. *E.G.'s Medical Condition*

[6] Thompsons' counsel wanted to question E.G. about (1) the fact that as a result of a fall he suffered from epileptic seizures and (2) the medication that he took in that respect. Counsel was seeking to boost E.G.'s credibility by explaining why, during his cross-examination by State Farm's counsel, he was unable to recall earlier statements *940 that he had made and deposition testimony that he had given about his stock and his business. When State Farm objected, the district judge applied Fed.R.Evid. 403 to limit the questioning as to whether the fall (about which the jury had heard) had

affected E.G.'s memory, expressly precluding Thompsons' counsel from delving into E.G.'s medical condition and medication.

Under Fed.R.Evid. 403 (*Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 871 (10th Cir.1993)):

The trial judge conducts a balancing of the probative value of the evidence against its potentially prejudicial, confusing, or misleading effect.

And that balancing (like all other evidentiary rulings) is reviewed under an abuse of discretion standard (*Joseph v. Terminix Int'l Co.*, 17 F.3d 1282, 1284 (10th Cir.1994)).

Here the district judge's acceptance of State Farm's expressed concern as to unfair prejudice stemming from the proposed lines of examination was well within her discretion. In this instance the jury had already learned of E.G.'s earlier heart attack (although the jury had been instructed to disregard that fact), and for E.G. to tell them also of his seizures would carry the potential of an inappropriate appeal to the jury's sympathy. Because the proffered evidence was irrelevant of itself, bearing only on E.G.'s loss of memory, the district judge's decision to admit evidence of the latter but not of E.G.'s seizures and medication reflected a fair balancing under the rule.

[7] Thompsons relatedly complain of the district judge's refusal to allow E.G.'s cardiologist Dr. William Ross ("Dr. Ross") to testify as to E.G.'s medical condition. In this instance Dr. Ross had been omitted from the witness lists that the parties had exchanged some months ahead of trial, pursuant to court order. Thompsons claim that the omission was inadvertent, and we do not question that assertion.

[8] Exclusion of a witness not listed as required by a pretrial order is also reviewed for an abuse of discretion (*Grant v. Brandt*, 796 F.2d 351, 355 (10th Cir.1986)). Hence the district judge's ruling will be overturned only if it "resulted in manifest injustice" to Thompsons (*id.*; *Long v. Laramie County Community College Dist.*, 840 F.2d 743, 750 (10th Cir.1988)). That cannot be the case here, given our ruling as to the exclusion of E.G.'s testimony on the same subject.

2. *Fire's Point of Origin*

[9] Thompsons also contend that the district judge improperly barred questioning as to the fire's point of origin in the building. State Farm objected on relevancy grounds, given the parties' stipulation that the fire was incendiary in origin and had been and set intentionally. Thompsons respond that because two or three people had identified different places as the point of origin, State Farm's failure properly to investigate that issue evidences a "slip shod" investigation, in turn supporting a finding of bad faith in breach of its already-mentioned duty under Oklahoma law to act in good faith toward its insured.

Of course only relevant evidence is admissible (Fed.R.Evid. 402; *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1424 (10th Cir.1991)), and Thompsons' mere assertion does not make the point of origin of the fire relevant to State Farm's duty to make a good faith assessment of Thompsons' claim of loss. Once State Farm had established that an incendiary fire had destroyed the building, all that was directly relevant to its investigation was who set it: If it were Thompsons, State Farm had no obligation to honor their claim under the Policy; but if someone else had done so (without Thompsons' contrivance), that contractual commitment remained. On that score Thompsons have offered no suggestion as to the relevancy of the offered evidence to State Farm's good faith vel non, and we can think of none. Thus the district judge properly barred Thompsons from questioning State Farm's witness on an irrelevant issue (*FDIC v. United Pacific Ins. Co.*, 20 F.3d 1070, 1081-82 (10th Cir.1994)).

3. *Expert Testimony on Unfair Settlement Practices*

[10] Lastly Thompsons attack the exclusion of another proposed witness who had *941 inadvertently been omitted from their witness list-this time John Hammond ("Hammond"), whom they describe as an expert in "bad faith denial and investigation of insurance claims." Hammond was offered as an expert witness under

Fed.R.Evid. 702, assertedly so that the jury would be able to compare State Farm's actions "to the industry standard and the laws of the State of Oklahoma."

What we have already said as to the Act's not creating a private right of action casts a cloud on the relevance (and hence the admissibility) of any testimony (expert or otherwise) in that respect under Fed.R.Evid. 402 (*United States v. Gallegos*, 975 F.2d 710, 711-12 (10th Cir.1992)). And what we have already said as to the jury's competence to deal with the bad faith issue on its own confirms the discretionary power of the magistrate judge to bar testimony by the asserted expert. It must be remembered that Fed.R.Evid. 702 includes a requirement that the testimony will "assist the trier of fact to understand or to determine a fact in issue," a requirement that "goes primarily to relevance" (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, ----, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993)). And as we said in *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 648 (10th Cir.1991), under Fed.R.Evid. 702"the 'touchstone' of admissibility is helpfulness to the trier of fact."

Expert testimony, like any other evidence, is subject to exclusion if it fails the Fed.R.Evid. 403 balancing test (*United States v. Onumonu*, 967 F.2d 782, 786 (2d Cir.1991)). And where as here expert testimony is offered on an issue that a jury is capable of assessing for itself, it is plainly within the trial court's discretion to rule that testimony inadmissible because it would not even marginally "assist the trier of fact," while it must be viewed as a "needless presentation" (Fed.R.Evid. 403) for the reasons that we have already explained. That conclusively negates any "manifest injustice" by reason of Thompsons' not being able to add and later call Hammond as a witness.

Partial Judgments as a Matter of Law

[11] Thompsons challenge the magistrate judge's grant of a judgment in State Farm's favor on Thompsons' claim of intentional infliction of emotional distress. That ruling (which the parties mislabel as a directed verdict, employing the now-outmoded terminology under Fed.R.Civ.P. ("Rule") 50(a)(1)) was grounded on the district judge's determination that two elements of a prima facie case were lacking:

1. a showing that State Farm's conduct was extreme and outrageous; and

2. a showing that "physical impairment or severe emotional distress resulted."

Thompsons link their challenge under Rule 50(a)(1) to another claimed error by the district judge: her refusal to instruct the jury on punitive damages in connection with Thompsons' claim that State Farm acted in bad faith in processing their insurance claim. That ruling was in turn predicated on Thompsons' failure to present any evidence of "wanton, willful, malicious, or intentional conduct" on State Farm's part.

[12][13] We stand in the shoes of a trial court when passing on its grant of a Rule 50(a)(1) motion-that is, we review that decision de novo and apply the same legal standards as did the trial judge (*Knight v. Snap-On Tools Corp.*, 3 F.3d 1398, 1401 (10th Cir.1993)). Just as with a grant of summary judgment under Rule 56, judgment as a matter of law is appropriate only where, with reasonable inferences from the evidence drawn in the nonmovant's favor, a jury verdict in its favor would be improper (*Rajala*, 919 F.2d at 615). And in a diversity case such as this, "we examine the evidence in terms of the underlying burden of proof as dictated by state law" (*Vasey v. Martin Marietta Corp.*, 29 F.3d 1460 (10th Cir.1994)).

[14][15] As to Thompsons' intentional infliction of emotional distress claim, we noted in *Katzer v. Baldor Elec. Co.*, 969 F.2d 935, 939 (10th Cir.1992) that Oklahoma applies the standards laid down in Restatement (Second) of Torts § 46 (1977). Under that standard (*Breeden v. League Serv. Corp.*, 575 P.2d 1374, 1377 (Okla.1978)):

The court, in the first instance, must determine whether the defendant's conduct *may* reasonably be regarded *so extreme and* *942 *outrageous* as to permit recovery, or whether it is necessarily so. Where, under the facts before the court, reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in any given case has been significantly extreme and outrageous to result in liability.

Accord, *Smith v. Farmers Coop. Ass'n,* 825 P.2d 1323, 1327 (Okla.1992). In that respect, mere unreasonableness of behavior will not suffice. Rather defendant's conduct must be "beyond all possible bounds of decency in the setting in which it occurred," or "utterly intolerable in a civilized community" (*Eddy v. Brown,* 715 P.2d 74, 77 (Okla.1986) (internal quotation marks omitted)). Additionally, while it is for the court to determine whether "*severe emotional distress* can be found" (*Breeden,* 575 P.2d at 1377), even if such distress exists an absence of extreme and outrageous behavior precludes recovery as a matter of law (*id.* at 1378).

Here are the matters that Thompsons say tend to support their claim of intentional infliction of emotional distress:

1. State Farm's agent and adjuster refused to help them fill out the proof of loss form.

2. State Farm's agent advised E.G. not to hire a lawyer in connection with the claim.

3. State Farm continually asked for more information, claimed forms were improperly filled out and failed to return calls and to keep appointments, all of those actions serving to drag out the claims process.

4. State Farm spoke with neighbors when investigating the fire, affecting Thompsons' relationship with them.

5. State Farm's interference prevented the sale of Thompsons' business going through.

6. After the fire State Farm cancelled Thompsons' insurance.

Even if all those items-a number of which are extraordinarily dubious under the evidence-were to be credited (and thus viewed in the light most favorable to Thompsons), as a matter of law they do not amount to extreme and outrageous behavior.

At worst it may have been less than courteous for State Farm not to have helped to fill out the claim form. Advice not to hire a lawyer may be bad advice (though not always)-but it is surely not beyond the bounds of decency. As for policy cancellation, to deprive insurance companies of that privilege generally (which would be the effect of declaring it to be extreme and outrageous conduct) would make no sense in free market or any other terms. And more specifically on the facts of this case, where State Farm had material evidence (more than enough to present the issue to the jury) that Thompsons themselves had set the fire, the cancellation clearly cannot be attacked on those grounds.

All of the other matters on which Thompsons seek to rely concern the manner in which State Farm investigated their claim. While State Farm may have exhibited a lack of tender solicitude for Thompsons, clearly its conduct did not amount to the type of harassment and threats that could be considered extreme and outrageous (compare the facts that were similarly found insufficient in such cases as *Breeden,* 575 P.2d at 1378 and *Haynes v. South Community Hosp. Management, Inc.,* 793 P.2d 303, 307 (Okla.Ct.App.1990)).

In sum, the evidence simply does not support submission of the issue of extreme and outrageous conduct to the jury. That alone is enough to affirm the district judge's Rule 50(a)(1) judgment, without any need to determine the existence or nonexistence of severe emotional distress.

[16] We turn to the district judge's refusal to submit the punitive damages issue to the jury-effectively the equivalent of a judgment in State Farm's favor on that issue as a matter of law. On that score the district judge correctly stated Oklahoma law, albeit in slightly different words. Under state law it is the duty of the trial judge to determine whether there is sufficient evidence of "fraud, oppression, gross negligence or malice, actual or presumed" from "wilful acts" to present the issue to the jury (*943*McLaughlin v. National Benefit Life Ins. Co.,* 772 P.2d 383, 387 (Okla.1988)). Here the record amply discloses evidence in support of State Farm's legitimate belief that it had no obligation to honor Thompsons' claim. As a matter of law, State Farm's actions in in-

vestigating the validity of that belief cannot be said to have been sufficiently egregious to allow the award of punitive damages.

[17] Indeed, we should observe as to both issues discussed in this section that Thompsons cannot complain in any event, because the jury found State Farm did not act in bad faith anyway. That being so, it would have been legally impossible for the jury either to award punitive damages on that issue or to find intentional infliction of emotional distress (a tort that requires behavior just as objectionable a showing of bad faith, as *Goodwin v. Old Republic Ins. Co.*, 828 P.2d 431, 432 n. 1 (Okla.1992) teaches).

Time Allowed for Closing Argument

[18][19] Thompsons claim reversible error in the district judge's limitation of each side's closing argument to 20 minutes. Whether because such restrictions are infrequently imposed or because lawyers recognize the discretionary nature of such rulings or for some other reason, few reported decisions deal with the question. We last had occasion to pass on it nearly three decades ago, when we said in *Carlin v. Stringer*, 365 F.2d 597, 599 (10th Cir.1966):

Supervision of oral argument is part of the procedural conduct of the trial and is primarily entrusted to the discretion of the trial court.FN5

FN5. Although cases from our sister circuits are similarly scant in number, they apply the same standard: *Bonilla v. Yamaha Motors Corp.*, 955 F.2d 150, 155 (1st Cir.1992); *United States v. Handfinger*, 364 F.2d 800, 802 (3d Cir.1966); *Murphy v. National R.R. Passenger Corp.*, 547 F.2d 816, 818 (4th Cir.1977); *Jeter v. St. Regis Paper Co.*, 507 F.2d 973, 980 (5th Cir.1975).

Decisions affecting the time allocated for closing argument will be reversed only for an abuse of that discretion (*id.*), which means that Thompsons must show that they were prejudiced by the trial court's ruling (*Franklin v. Shelton*, 250 F.2d 92, 99 (10th Cir.1957)).

In an effort to make that showing Thompsons cite this note that the jury sent out during its deliberations:

Could someone explain concealment of fraud, according to the policy, Section 1 and 2 conditions?

Thompsons contend that note reflects confusion on "the central issue in the case," a confusion that could have been avoided had they been allowed more time for closing argument. As for the reason that 20 minutes was assertedly insufficient, Thompsons simply refer to the length of the trial (four days) and to the number of witnesses and exhibits presented. None of that, either singly or collectively, amounts to a showing of prejudice.

If the jury's question reflected a need for exposition as to the law, which is how it sounds, that does not bear on closing argument in any event. After all, it was not the role of Thompsons' lawyers to instruct the jury on the law, "for it is axiomatic that the judge is the sole arbiter of the law and its applicability" (*Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir.1988) (en banc)). If on the other hand the question reflected confusion as to the relevant facts and as to whether or not they satisfied the legal standard (although that seems a less plausible reading of the question), it would be a proper subject for oral argument. But Thompsons do not show (as they must) what their lawyer would have done differently if he had more time. They point to nothing, to no particular piece of evidence or testimony, as to which more time would arguably have enabled their counsel to alleviate the jury's confusion and to obtain a favorable verdict.

Thus Thompsons have failed to show any prejudice from the curtailment of closing argument. Absent such a showing, it must be concluded that the district judge did not abuse her discretion in imposing the time limitation.

Jury's Answers to Interrogatories

[20] We turn finally to Thompsons' last argument for reversal: the alleged inconsistency*944 of the jury verdict.FN6 Thompsons point to the jury's findings (1) that

Thompsons did not violate the Intentional Acts provision of the Policy (that is, they did not set the fire themselves or cause it to be set) but (2) that they did violate the Concealment or Fraud provision (that is, they lied about the imminent sale of their Tah-Mels business or of the Honduran stock or both).[FN7] Thompsons urge that if they did not set the fire they had no reason not to be entirely truthful in the information that they gave State Farm, so that the jury's finding that they violated the Concealment or Fraud provision can only be described as illogical. State Farm counters that Thompsons waived that argument by failing to present it before the dismissal of the jury.

FN6. We reproduce the verdict form as the Appendix to this opinion.

FN7. Again, lacking the Policy in the record we do not have its precise provisions. But given the argument of counsel before the district judge concerning the jury instructions and the portion of those instructions contained in the record, those are the clear meanings of the two jury responses.

RTC v. Stone, 998 F.2d 1534, 1545 (10th Cir.1993) teaches that the application of that doctrine of waiver depends on the type of jury verdict at issue:

A failure to object to general jury verdicts on the ground of inconsistency before the jury is discharged constitutes waiver, unless the verdict is inconsistent on its face such that entry of judgment upon the verdict is plain error. *Hinds v. General Motors Corp.,* 988 F.2d 1039, 1047 (10th Cir.1993). However, when the verdicts are special verdicts a party is not required to object to the inconsistency before the jury is discharged in order to preserve that issue for a subsequent motion before the district court. *Bonin v. Tour West, Inc.,* 896 F.2d 1260, 1263 (10th Cir.1990) [(per curiam)].

And Rules 49(a) and (b) define the alternative types (we quote only the opening sentence of each-all that is needed for the present analysis):
(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.

In this instance Part 1 of the Verdict Form reproduced in the Appendix is plainly a general verdict (see, e.g., *Stone,* 998 F.2d at 1547), while Part 4 just as plainly sets out accompanying interrogatories. No objection on purported grounds of inconsistency was lodged by Thompsons' counsel at any time before the jury was discharged-instead it was fully a week later, as part of Thompsons' written post-trial motion, that the contention was advanced for the first time. Thompsons' current argument that waiver is somehow averted by their counsel's one-sentence oral motion for judgment notwithstanding the verdict, a motion made before the jury was discharged but that did not even hint at any inconsistency argument, is simply untenable.

[21] That leaves only the question whether "the verdict is inconsistent on its face such that entry of judgment on the verdict is plain error" (*Stone,* 998 F.2d at 1545). To ask that question is really to answer it. Whatever Thompsons' motives may have been-whether to conceal their burning of their own property or otherwise-the jury was entitled to find entirely compelling the evidence that Thompsons gave materially false and misleading answers to State Farm's investigator Sands. And it does not matter that the jury simultaneously found that State Farm had not also proved the most common motive for such conduct-arson by the insured. It must be remembered that the Policy's provisions dealing with Intentional Acts and with Concealment or Fraud are independent grounds for denial of coverage, either one sufficing to defeat the insured's claim.

It is undisputed that the district judge properly instructed the jury that it was State Farm's burden to prove its affirmative defenses, based on those two provisions, by a *945 preponderance of the evidence. We do not eavesdrop on juries, so that we have no way of knowing why the jury found that burden had not been met on the more serious charge of Intentional Acts, with its overtones of criminality-perhaps it may have done so because of those very overtones (see the Supreme Court's discussion of the concept of jury lenity in the criminal law context in *United States v. Powell,* 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984)). What controls here is that a rational jury could readily have done just what this jury did. Because there is surely no plain error in that, Thompsons have failed to prevail here, and that is the end of our analysis (*Stone,* 998 F.2d at 1547).

Conclusion

We have addressed all of Thompsons' arguments attacking the conduct and outcome of their jury trial below, and we have found all of them to be without merit. We AFFIRM.

APPENDIX

VERDICT FORM

We the jury, duly empaneled and sworn in the above-entitled cause, do, upon our oaths, find:

PART 1

Do you find that the plaintiffs, E.G. and Betty Thompson, should recover on their contract claim against the defendant, State Farm Fire & Casualty Company?

YES NO

(if the answer is yes, proceed to Parts 2 and 3)

(if the answer is no, proceed to Part 4)

(COMPLETE PART 2 AND 3 ONLY IF YOU ANSWERED "YES" IN PART 1)

PART 2

WE, the jury, being duly sworn upon our oaths, find the damages to the plaintiffs to be:

For the structure: $________

(not to exceed the policy limit for liability on the structure: $40,000)

For the contents: $________

(not to exceed the policy limit for liability on the contents: $10,000)

For lost rents: $________

(not to exceed $4200 which is $350 per month for twelve months beginning on June 6, 1991, the date of the fire)

PART 3

Do you find that plaintiffs have proven their claim of bad faith?

YES ____

and set the amount of plaintiffs' damages at $__________

(do not include the damages awarded in Part 2)

-or-

NO ____

*946

PART 4

Do you find that plaintiffs violated the "Intentional Acts" provision of their insurance policy?

YES NO

Do you find that plaintiffs violated the "Concealment or Fraud" provision of their insurance policy?

YES NO

3/4/93 /s/ Bruce Lee Smith

Date Foreman

C.A.10 (Okl.),1994.
Thompson v. State Farm Fire and Cas. Co.
34 F.3d 932, 30 Fed.R.Serv.3d 62, 41 Fed. R. Evid. Serv. 156

END OF DOCUMENT

EXHIBIT 10

H
Wood v. Allstate Ins. Co.
C.A.7 (Ind.),1994.

United States Court of Appeals,Seventh Circuit.
Colleen WOOD, Plaintiff-Appellant,
v.
ALLSTATE INSURANCE COMPANY, Defendant-Appellee.
No. 93-1734.

Argued Nov. 9, 1993.
Decided April 7, 1994.

Insured, whose home was destroyed by arsonist, brought action against insurer demanding payment. The United States District Court for the Northern District of Indiana, Rudy Lozano, J., 815 F.Supp. 1185, granted summary judgment for insurer and insured appealed. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) provision in policy requiring suit against insurer to be brought within one year of date of loss was ambiguous as to whether date of loss was day fire began or day fire was extinguished, and would be construed in favor of insured, and (2) questions of fact existed as to whether insured breached cooperation clause by failing to authorize release of tax and vehicle registration records and by claiming inability to recall information at examination under oath, precluding summary judgment.

Reversed and remanded.

West Headnotes

[1] Insurance 217 ⚷2166(3)

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2166 Acts of Insureds
217k2166(3) k. Arson or Incendiarism. Most Cited Cases
(Formerly 217k139)

Indiana public policy would bar a homeowner who burns down her own house from collecting insurance proceeds.

[2] Insurance 217 ⚷3564(4)

217 Insurance
217XXXI Civil Practice and Procedure
217k3561 Time Limitations Under Policy Provisions
217k3564 Time Within Which Action Must Be Brought
217k3564(2) Validity of Provisions
217k3564(4) k. Period Shorter Than Statute. Most Cited Cases
(Formerly 217k620.1)

Parties to insurance contract may agree to shorter limitations period than that provided by statute. West's A.I.C. 34-1-2-2(6).

[3] Insurance 217 ⚷3564(7)

217 Insurance
217XXXI Civil Practice and Procedure
217k3561 Time Limitations Under Policy Provisions
217k3564 Time Within Which Action Must Be Brought
217k3564(5) Computation
217k3564(7) k. Accrual. Most Cited Cases
(Formerly 217k622(3))

Provision in homeowner's policy stating that suit against insurer needs to be brought "within one year of the date of loss" was ambiguous as to whether "date of loss" is date fire began or date fire was extinguished and would be construed in insured's favor.

[4] Insurance 217 ⚷1713

217 Insurance
217XIII Contracts and Policies

217XIII(A) In General
217k1711 Nature of Contracts or Policies
217k1713 k. Policies Considered as Contracts. Most Cited Cases
(Formerly 217k124(1))

Insurance 217 ⚷1812

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1811 Intention
217k1812 k. In General. Most Cited Cases
(Formerly 217k146.3(1))
Insurance policies are contractual agreements, and in divining their terms the starting point is the intent of the parties.

[5] Federal Courts 170B ⚷372

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(A) In General
170Bk372 k. Diversity of Citizenship Jurisdiction. Most Cited Cases
Federal court sitting in diversity jurisdiction should attempt to determine how dispute before it would be resolved by state's highest court.

[6] Insurance 217 ⚷1832(1)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) k. In General. Most Cited Cases
(Formerly 217k146.7(1))
Under Indiana law, ambiguous insurance policies are interpreted in light most favorable to insured.

[7] Federal Civil Procedure 170A ⚷2501

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 k. Insurance Cases. Most Cited Cases
Genuine issue of material fact existed as to whether insured under policy providing fire coverage for her home breached cooperation clause with respect to obligation to provide insurer with documents and to submit to examination under oath, precluding summary judgment for insurer. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[8] Insurance 217 ⚷3202

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3202 k. In General. Most Cited Cases
(Formerly 217k514.17(10))

Insurance 217 ⚷3212

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3210 Effect of Failure to Cooperate
217k3212 k. Prejudice to Insurer. Most Cited Cases
(Formerly 217k514.17(10), 217k138(4))
Under Indiana law, cooperation clauses are valid and enforceable, but insurer is able to invoke such clause to avoid liability only where it is materially prejudiced by insured's failure to cooperate.

[9] Federal Civil Procedure 170A ⚷2501

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases

170Ak2501 k. Insurance Cases. Most Cited Cases
Issue whether insured was lying when, at examination under oath following destruction of her home by fire, she said that she did not remember number of details of her personal and financial history could not be resolved on summary judgment motion. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[10] Insurance 217 ⚿3171

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3171 k. Examination of Insured. Most Cited Cases
(Formerly 217k548)
Insured's refusal to submit to examination under oath (EUO) is breach of policy's cooperation clause, and insured who does so is not entitled to recover proceeds under policy.

[11] Insurance 217 ⚿3171

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3171 k. Examination of Insured. Most Cited Cases
(Formerly 217k548)
Insured who ostensibly submits to examination under oath (EUO), but says she does not remember relevant information that in fact she does, or claims that relevant documents have been destroyed when in fact they were not, has in effect refused to submit to examination and has breached cooperation clause.

[12] Federal Civil Procedure 170A ⚿2501

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 k. Insurance Cases. Most Cited Cases
Question whether insurer suffered prejudice from insured's failure to sign copy of transcript of examination under oath (EUO) was issue of material fact, precluding summary judgment for insurer on theory insured breached cooperation clause. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[13] Federal Civil Procedure 170A ⚿2501

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 k. Insurance Cases. Most Cited Cases
Question whether insured, whose home was destroyed by fire, breached cooperation clause by failing to provide authorizations that would allow insurer to obtain copies of insured's tax returns and vehicle registration records, was issue of material fact precluding summary judgment. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[14] Insurance 217 ⚿3206

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3203 What Constitutes Cooperation; Failure to Cooperate
217k3206 k. Providing Information in General. Most Cited Cases
(Formerly 217k548)
Where possibility is raised that insured torched her own house in order to collect on insurance policy, financial condition of insured is plausibly at issue, and insured's failure to provide information may constitute breach of cooperation clause.

*742 Nick Katich (argued), Lucas, Holcomb & Medrea, Merrillville, IN, for plaintiff-appellant.
Robert G. Devetski (argued), Robert J. Konopa, Konopa & Murphy, South Bend, IN, for defendant-

appellee.

Before CUDAHY and ROVNER, Circuit Judges, and WILL, District Judge.FN*

FN* The Honorable Hubert L. Will of the Northern District of Illinois, is sitting by designation.

CUDAHY, Circuit Judge.

An arsonist set fire to Colleen Wood's house at Lake Station, Indiana on January 29, 1991. The house was destroyed in the fire. Allstate Insurance, Wood's insurer, thinks there was at least some chance that Wood herself is the arsonist. They are therefore investigating her claim, and have refused to pay until their investigation is complete. Unsatisfied, Wood brought this action against Allstate demanding payment.

[1] Wood's homeowner's insurance policy, purchased from Allstate, became effective August 17, 1990. The policy insured Wood's house and property against "sudden and accidental physical loss," including loss caused by fire. R. 36, Exh. 1, p. 7. The policy expressly excluded from its coverage any loss caused by the "[i]ntentional or criminal acts of any insured person." But even had the insurance contract lacked such a provision, Indiana law (which governs this diversity action), would of course-as a matter of public policy-imply such a term rather than permit a homeowner who burned down her own house to collect insurance proceeds. *American Economy Ins. Co. v. Liggett*, 426 N.E.2d 136, 140 (Ind.App.1981).

Wood's house caught fire late at night on January 29, 1991, and the fire was extinguished by the early morning hours on January 30, 1991. Police and fire investigators found accelerant and suspected arson. Wood does not deny that the fire was deliberately set, only that she set it. Allstate has not denied Wood's claim, but is continuing its investigation. But because under the insurance policy Wood is required to sue Allstate, if she is to do so at all, "within one year after the date of loss," R. 36, Exh. 1, p. 22, Wood brought this action demanding payment.

The insurance policy contains two provisions that are at issue here. The first is the contractual limitations provision, declaring that if Wood wants to sue Allstate on the insurance contract, she must do so "within one year after the date of loss." This suit was filed on January 30, 1992. That was one year from the date that the fire was extinguished, but a year and a day from the date on which it began.

The second provision, a "cooperation clause," says that "no suit or action may be brought against us unless there has been full compliance with all of the policy terms." R. 36, Exh. 1, p. 22. The policy terms here in question require Wood to provide "all accounting*743 records, bills, invoices, and other vouchers, or certified copies," that Allstate "may reasonably request." R. 36, Exh. 1, pp. 17-18. Wood must also "submit to examinations under oath and sign a transcript of the same" as often as Allstate may "reasonably require." R. 36, Exh. 1, p. 18.

Allstate moved for summary judgment, contending both that the suit was barred by the contractual limitations period and that Wood breached her contractual duty to cooperate with the investigation. The district court agreed on both counts, and entered summary judgment in favor of Allstate. 815 F.Supp. 1185. We disagree with the court's interpretation of the limitations provisions, and finding the existence of genuine issues of material fact precluding the entry of summary judgment on the cooperation clause, reverse.

I. Limitations period.

[2] While Indiana's ten-year statute of limitations for breach of contract actions would otherwise apply, *see*IC 34-1-2-2(6); *Panos v. Perchez*, 546 N.E.2d 1253 (Ind.App.1989), the parties to an insurance contract may agree to a shorter limitations

period than that provided by the statute. *E.g. Meridian Mut. Ins. Co. v. Caveletto,* 553 N.E.2d 1269 (Ind.App.1990). The parties here agreed to a one-year contractual limitations period, and that agreement is valid and enforceable. *Id.*

[3] The policy says that any suit against Allstate needs to be brought "within one year of the date of loss." The fire began on January 29, 1991, and was extinguished on January 30, 1991. The complaint was filed (and therefore the suit was brought) on January 30, 1992. The question is whether this was "within one year after the date of loss."

We note at the outset that this interpretive difficulty, like too many others, could have been eluded had counsel filed the relevant papers a day earlier. *See United States v. Locke,* 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) (Supreme Court, dividing 6-3, found that notice of intent to hold a claim filed on December 31 did not satisfy a statute requiring that such notice be filed "prior to December 31"). But that notwithstanding, the question here is whether this suit, filed January 30, 1992, was brought "within one year after the date of loss." Or more precisely, when a fire burns over more than one day, what is the date of loss?

[4] Insurance policies are contractual agreements, and in divining their terms the starting point is of course the intent of the parties. *Evans v. National Life Acc. Ins. Co.,* 467 N.E.2d 1216, 1219 (Ind.App.1984). The district court, canvassing the three cases spanning over a century that have attempted to specify the "date of loss" when a fire's sparks ignite on one day and its last embers are extinguished on another, concluded that the date of loss was the day on which the fire broke out. *Johns v. New Hampshire Ins. Co.,* 66 Misc.2d 799, 322 N.Y.S.2d 324, 327 (N.Y.Sup.Ct.1971), a case from a New York intermediate appellate court, conflicts with the district court's conclusion, holding that it "seems fair to give [an insured] 12 months to sue from the time the fire has ended, rather than from a dubious point of beginning." But two older cases from Illinois support the district court, starting the clock on the contractual limitations period on the day the fire breaks out. *See Allemania Ins. Co. v. Little,* 20 Ill.App. 431 (1886); *Western Coal & Dock Co. v. Traders Ins. Co.,* 122 Ill.App. 138 (1905).

[5] The court found that its conclusion was further supported by the Indiana Court of Appeals decision in *Brunner v. Economy Preferred Ins. Co.,* 597 N.E.2d 1317 (Ind.App.1992). That case held that under an insurance policy (not unlike the one at issue here) requiring the insured to bring suit within one year of the date of loss, suit needed to be brought within one year from "the date of the occurrence of the destructive event," rather than a year from the day on which the insured discovered the damage. According to the district court, *Brunner* teaches that Indiana law is not concerned with whether the insured "knew or should have known that damage had occurred." Order (Feb. 22, 1993) at 13. While a federal court sitting in diversity jurisdiction should attempt to determine how the dispute before it would be resolved by the state's highest *744 court, *Todd v. Bic,* 9 F.3d 1216, 1221-22 (7th Cir.1993); *Green v. J.C. Penney Auto Ins. Co., Inc.,* 806 F.2d 759, 761 (7th Cir.1986), we do not find *Brunner* to be a helpful guidepost in predicting how Indiana law would address this question.

Brunner holds that if the contract requires an insured to sue within a year of the date of loss, the clock begins on the date of loss, not when the insured first discovers the damage. That much is clear. But Wood is not claiming that the beginning of the limitations period should be tolled until she learned of the loss. Rather, she argues that the "date of loss" is January 30. *Brunner* tells us nothing about that question: whether the "date of loss" is the day the fire begins or ends. On this central question, Indiana law unfortunately provides no guidance.

We therefore turn to the first principles of contractual interpretation, principles firmly ensconced in Indiana law. Surely, if the contract said that in order to bring suit an insured must do so "within one year after the date the fire is ignited," this suit would be barred by the contractual limitations period. By contrast, if the language read "within a year after the date the fire is extinguished," it would be clear that this suit was brought within the limitations period. But rather than definite terms like "ignited" or "extinguished", the contract says "date of loss." At least in this context, that language is undoubtedly ambiguous.

[6] Indiana has long accepted the canon of construction under which ambiguous insurance policies are interpreted in the light most favorable to the insured. *E.g. Tate v. Secura Ins.*, 587 N.E.2d 665 (Ind.1992); *State Security Life Ins. Co. v. Kinter*, 243 Ind. 331, 185 N.E.2d 527 (Ind.1962); *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570, 23 N.E. 498 (Ind.1890). This is simply an application of the contract law principle that ambiguities in contracts of adhesion are construed against the drafting party. *Evans*, 467 N.E.2d at 1219. Thus, the Indiana Supreme Court said in *Rogers* (and repeated many times since) that when language in an insurance policy is capable of two constructions, it should be given the one most favorable to the insured. *Rogers*, 23 N.E. at 500. As we have noted, "date of loss" is surely capable of two constructions. It can plausibly mean either the date on which the fire begins or the date on which it is put out. That being the case, the provision should be read in Wood's favor, to mean the date on which the fire was extinguished. Thus, as we read the contractual limitations period in light of this canon of construction, the suit was brought "within a year after the date of loss," and the district court should not have granted summary judgment in favor of Allstate on this ground.[FN1]

FN1. Because the district court concluded that the day on which the fire began was the "date of loss," it went on to address the questions of waiver and estoppel. In a number of letters addressed to Wood, Allstate apparently referred to the fire as occurring on January 30, 1991. Wood therefore argued that Allstate has waived the benefits of the contractual limitations period, or relatedly that it should now be estopped from asserting the clause. The district court rejected these arguments, and they are advanced again on appeal. Yet in light of our conclusion that this action was brought within the contractual limitations period, it is unnecessary for us to resolve these questions.

II. Failure to cooperate.

The policy says that in the event of a loss, the insured must provide Allstate with "all accounting records, bills, invoices, and other vouchers, or certified copies, which we may reasonably request," and, "as often as we may reasonably require," to "submit to examinations under oath and sign a transcript of the same." R. 36, Exh. 1, pp. 17-18. The policy further notes that "no suit or action may be brought against us unless there has been full compliance with all the policy terms." R. 36, Exh. 1, p. 22. Sufficiently cooperating with Allstate's investigation, then, is a condition precedent to the company's obligations under the contract.

[7] Wood has undeniably been lackluster in cooperating with Allstate's investigation. Allstate argues that Wood has breached the policy's cooperation clause, and that it therefore is not liable under the contract. Cooperation clauses are particularly important in the liability insurance context. The insured injures the plaintiff, and the plaintiff sues the *745 insured. The insurance company will pay the judgment, and therefore has an interest in seeing that the insured puts on a good defense. In fact, the insurance agreements will typically provide that the insurance company will pay the cost of the defense. But even so, its ability to defend its interests will depend on the insured's cooperation in defending against the lawsuit. The concern is that the plaintiff and the insured might collude, to the detriment of the insurance company. *See* Note, *Conduct of the Insured Under Cooperation Clauses in Policies of*

Liability Insurance, 22 Notre Dame L. 118 (1946).

But cooperation clauses are clearly enforceable in other insurance contexts as well, as such provisions "enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims." *Claflin v. Commonwealth Ins. Co. of Boston, Mass.*, 110 U.S. 81, 94-95, 3 S.Ct. 507, 514-15, 28 L.Ed. 76 (1884). They therefore "universally have been held to be valid." 8 John Alan Appleman & Jean Appleman, *Insurance Law and Practice*, § 4771 (1981).

[8] Unless the insurer waives the clause or is estopped from asserting it, a "breach of the cooperation clause by the insured will operate to relieve the insurer of liability under the policy." *Id.*, § 4772; *Motorists Mut. Ins. Co. v. Johnson*, 139 Ind.App. 622, 218 N.E.2d 712 (Ind.App.1966). But some courts, including Indiana courts, "have adopted the rule that the insured's violation of a cooperation clause constitutes a defense to the insurer only where it can show that it was substantially prejudiced by such violation." Appleman, *Insurance Law and Practice*, § 4773. "Non-cooperation must be material. Prejudice must be shown by the insurer." *Motorists Mutual*, 218 N.E.2d at 715.

In *Miller v. Dilts*, 463 N.E.2d 257 (Ind.1984), the Indiana Supreme Court expressly approved the appellate court's decision in *Motorists Mutual*, announcing that "an insurance company must show actual prejudice from an insured's noncompliance with the policy's cooperation clause before it can avoid liability under the policy." *Id.* at 261. It then went on to address the related (but distinct) obligation of an insured (in the liability insurance context) to provide the insurer with notice of a claim against the insured for which the insurer will ultimately be liable. There, the court ruled that prejudice will be presumed from the failure to provide notice. It therefore found that "notice provisions in insurance policies are not equivalent to the cooperation clauses" in that the failure to cooperate, unlike the failure to provide notice, can "be technical and inconsequential, thereby resulting in no prejudice to the insurance company." *Id.* at 265. The state of Indiana law on the duty to cooperate is therefore clear. Where insurance policies contain cooperation clauses, those provisions are valid and enforceable. But an insurance company is able to invoke such a clause to avoid liability only where it is materially prejudiced by the insured's failure to cooperate.

The district court here granted summary judgment in favor of Allstate, as an alternative ground, because of Wood's failure to cooperate. A month after the fire, Wood submitted a proof of loss claiming more than $80,000 in damages. An attorney for Allstate requested that Wood submit to an examination under oath (EUO), and Wood did so. At the April 1, 1991 examination, Wood said that she did not remember a number of details of her personal and financial history, and said that a number of records that Allstate requested (including her 1990 tax returns) were destroyed in the fire. When a copy of the transcript was sent to Wood, she did not sign and return it as requested, nor did she respond to Allstate's request to continue the examination on April 23, 1991. Allstate's attorney then wrote to Wood advising her that her failure to continue the EUO could result in the denial of her claim, and requested that she continue the examination on May 6, 1991. On May 6, Wood called Allstate's attorney to cancel the EUO scheduled for that day, and asked to reschedule it for May 28, 1991.

*746 Wood did submit to the examination on May 28. Allstate also asked Wood to provide authorizations that would allow Allstate access to Wood's tax returns and Florida vehicle registration records (Wood owned real estate in Florida where she said she planned to move as soon as she resolved family matters in Indiana). Wood never provided the requested authorizations, though she had earlier given Allstate a "general authorization." The district court, in granting summary judgment, relied on (1)

Wood's alleged failure, when she submitted to the EUO, to remember relevant information and her claim that relevant documents were destroyed, (2) her failure to sign the EUO, and (3) her refusal to provide Allstate with authorizations that would allow the company to gain access to her tax records and Florida vehicle registration information. To affirm the district court's grant of summary judgment, we must find-with respect to at least one of these theories-that Wood's conduct amounts to a breach of the cooperation clause and that Allstate was prejudiced by it.

Summary judgment is appropriate, of course, only where there is no genuine issue of material fact. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In weighing Allstate's motion for summary judgment, the evidence should be construed in the light most favorable to Wood, and all reasonable inferences should be drawn in her favor. *Condo v. Sysco Corp.,* 1 F.3d 599, 601 (7th Cir.1993). We review the district court's entry of summary judgment de novo.

[9][10] The district court relied first on Wood's failure to remember relevant information when she submitted to the EUO and her failure to bring certain documents to the examination, claiming that they were destroyed in the fire. To refuse to submit to an EUO is to breach a policy's cooperation clause, and an insured who does so is not entitled to recover proceeds under the policy. *Standard Mut. Ins. Co. v. Boyd,* 452 N.E.2d 1074, 1079 (Ind.App.1983). But in granting summary judgment here, the district court took this a step further. "There can be little difference between an insured who refuses to submit to an EUO, and an insured who submits to the EUO, but claims that she cannot remember relevant information and that relevant documents have been destroyed." Order at 18-19.

[11] We agree that when an insured ostensibly submits to an EUO, but says she does not remember relevant information that in fact she does, or claims that relevant documents have been destroyed when in fact they were not, she has in effect refused to submit to the examination. But if the insured truly does not remember the information and the documents truly were destroyed, it cannot be said that the insured effectively refused to submit to the EUO. The question, therefore, is whether Wood's claims-that she cannot remember her income and that the documents were destroyed-are true. If they are not, she has breached the contract and Allstate owes her nothing. But it is fundamental that where "an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." 10A Charles Alan Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure,* § 2726 (1983) (quoting Fed.R.Civ.P. 56(e) advisory committee's note).

The district court, in granting summary judgment, made an implicit determination that Wood was lying. Because at summary judgment inferences of this sort need to be drawn in favor of the nonmoving party, we think the court incorrectly granted summary judgment on this ground. We hasten to add, however, that an insured who claims to have lost all relevant documents and to have forgotten all relevant information is not summary judgment-proof. For one, summary judgment might still be appropriate if it is clear that the insured breached the cooperation clause in some other manner, and moreover, in our view, cooperation clauses should be construed to impose a heightened obligation on an insured to assist the insurance company in obtaining copies of documents that were lost or destroyed. But a court cannot, at the summary judgment stage, conclude that an insured who claims that documents were destroyed is lying, and dismiss her suit on that basis and that basis alone.

*747 [12] Second, the court found that Wood's failure to sign the EUO's was a breach of the cooperation clause. While she was surely delinquent in doing so, Wood did ultimately sign the EUO's on February 3, 1992, shortly after the complaint was filed. Moreover, the EUO's were given under oath and transcribed before a court reporter. The question is therefore whether Allstate suffered any prejudice by virtue of the absence of Wood's signature from the EUO's for the months between the dates when the EUO's were taken (April 1, 1991 and May 28, 1991), and the time Wood signed them (February 3, 1992). Because whether Allstate suffered prejudice appears to us to be a contested issue of material fact, we conclude that the entry of summary judgment on this ground was inappropriate.

[13][14] The court finally concluded that Wood's failure to provide authorizations that would allow Allstate to obtain copies of Wood's tax returns and Florida vehicle registration records constituted a breach of the cooperation clause. The authorization for the motor vehicle records is puzzling, because Allstate does not explain either (1) what relevant information those records might contain (and surely the contractual language requiring Wood to provide information that Allstate "may reasonably request" limits Wood's obligation to providing relevant information), or (2) why it could not easily obtain that information from the Florida division of motor vehicles.[FN2] It is easier to understand why Allstate wanted the tax returns. Where the possibility is raised that an insured torched her own house in order to collect on the insurance policy, the financial condition of the insured is plausibly at issue. *See Stover v. Aetna Casualty and Surety Co.*, 658 F.Supp. 156, 160 (S.D.W.Va.1987) (footnotes omitted) ("Once the Defendant put in issue the possibility of arson, [the insured's financial status] became pertinent."); *but cf. Hines v. State Farm Fire & Cas. Co.*, 815 F.2d 648, 652 (11th Cir.1987) (finding there is no per se rule "requiring that an insured produce income tax returns where the insurer suspects fraud"). But it appears that Wood did sign a general authorization, and she argues here that this should have been sufficient. All of this appears to us to present a genuine issue of material fact. In reversing the district court's entry of summary judgment, we do not condone Wood's less than vigorous response to Allstate's inquiries. And we surely do not denigrate Indiana's important interest in combating arson and insurance fraud. A jury certainly could find, based on this record, that Wood breached her contractual duties and is not entitled to collect insurance proceeds. But we are unable to declare that no reasonable jury could reach a different result. Because we find that there is a genuine issue of material fact whether Wood breached the cooperation clause and whether Allstate was prejudiced thereby, the district court's entry of summary judgment is REVERSED, and the matter REMANDED for further proceedings consistent with this opinion.

FN2. While recent reform efforts have sought to limit the public availability of driving records, *see* Driver's Privacy Protection Act of 1993, H.R. 3365, 103d Cong., 1st Sess. (1993); Driver's Privacy Protection Act of 1993, S. 1589, 103d Cong., 1st Sess. (1993), the pending legislation would allow the disclosure of motor vehicle records for "use by any insurer ... in connection with claims investigation activities or antifraud activities." H.R. 3365 (proposed 18 U.S.C. § 2721(b)(9)). The Senate bill was incorporated into S. 1607, Violent Crime Control and Law Enforcement Act of 1993, which the Senate passed November 19, 1993.

C.A.7 (Ind.),1994.
Wood v. Allstate Ins. Co.
21 F.3d 741

END OF DOCUMENT

Westlaw Delivery Summary Report for RICHARDS,BOB F 5983773

Date/Time of Request:	Thursday, May 22, 2008 14:50 Central
Client Identifier:	99188-16324-00846
Database:	FSFIND
Citation Text:	988 F.Supp. 93
Lines:	1045
Documents:	1
Images:	0

The material accompanying this summary is subject to copyright. Usage is governed by contract with Thomson, West and their affiliates.

H

Harary v. Allstate Ins. Co.
E.D.N.Y.,1997.

United States District Court,E.D. New York.
Zehava HARARY, Plaintiff,
v.
ALLSTATE INSURANCE COMPANY, Defendant.
Civil Action No. CV-95-0234(DGT).

March 13, 1997.

Insured brought suit against fire insurer that had denied fire claim based on insured's failure to cooperate and suspected arson. Insurer moved for summary judgment on claims that were based on denial of coverage. The District Court, Trager, J., held that, under New York law, insured willfully violated cooperation clause of fire policy by failing to provide insurer with materially relevant financial information regarding her tax returns and income, and insurer's refusal to pay claim on fire of suspected incendiary origin was thus justified under cooperation clause.

Motion granted.

West Headnotes

[1] Civil Rights 78 ⚷1071

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1071 k. Property Rights. Most Cited Cases
(Formerly 78k130)

Civil rights statute guaranteeing to all citizens "rights enjoyed by white citizens to inherit, purchase, lease, sell, hold and convey real and personal property" applies to Jews and Arabs (and presumably Israelis), based on definition of race in Reconstruction era. 42 U.S.C.A. § 1982.

[2] Federal Civil Procedure 170A ⚷2546

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2546 k. Weight and Sufficiency. Most Cited Cases

Nonmoving party's conclusory assertions cannot defeat motion for summary judgment, especially when party's assertions are incredible as a matter of law. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[3] Insurance 217 ⚷2199

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2199 k. Burden of Proof. Most Cited Cases
(Formerly 217k429.1(1))

Insurance 217 ⚷2201

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2201 k. Weight and Sufficiency. Most Cited Cases
(Formerly 217k429.1(8))

Under New York law, fire insurer has burden of presenting clear and convincing evidence that fire was incendiary (not accidental) in nature and that insureds had motive and opportunity to commit crime in order to deny claim based on arson.

[4] Insurance 217 ⚷3206

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation

217k3203 What Constitutes Cooperation; Failure to Cooperate
217k3206 k. Providing Information in General. Most Cited Cases
(Formerly 217k514.17(1))

Under New York law, insured's obligation to cooperate is not met by partial testimony or by promises of evidence to be supplied in some indefinite future. N.Y.McKinney's Insurance Law § 3404(e).

[5] Insurance 217 ⚷3198(1)

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3193 Evidence
217k3198 Weight and Sufficiency
217k3198(1) k. In General. Most Cited Cases
(Formerly 217k562.3(3.1))

Under New York law, affirmative defense to insurance policy claim of "willful concealment or misrepresentation of material facts" requires proof by clear and convincing evidence.

[6] Insurance 217 ⚷3220

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3215 Evidence
217k3220 k. Weight and Sufficiency. Most Cited Cases
(Formerly 217k514.21(3))

Under New York law, failure to cooperate need be proved only by preponderance of evidence to deny claim under insurance policy. N.Y.McKinney's Insurance Law § 3404(e).

[7] Insurance 217 ⚷3171

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3171 k. Examination of Insured. Most Cited Cases
(Formerly 217k548)

Insured may not use Fifth Amendment privilege as sword against fire insurer. U.S.C.A. Const.Amend. 5; N.Y.McKinney's Insurance Law § 3404(e).

[8] Insurance 217 ⚷3202

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3202 k. In General. Most Cited Cases
(Formerly 217k539.12(1))

Under New York law, insured's obligation to cooperate with fire insurer in investigation of claim was not excused by any desire to avoid disclosing possible fraud committed on third party. U.S.C.A. Const.Amend. 5; N.Y.McKinney's Insurance Law § 3404(e).

[9] Insurance 217 ⚷3173

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3173 k. Documents, Records and Information in General. Most Cited Cases
(Formerly 217k544)

Under New York law, insured's income tax returns for year immediately prior to and year of fire were relevant and material to fire insurer's investigation into suspected arson, and their disclosure fell within insured's duty to cooperate. N.Y.McKinney's Insurance Law § 3404(e).

[10] Insurance 217 ⚷3173

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss

217k3173 k. Documents, Records and Information in General. Most Cited Cases
(Formerly 217k544)
Under New York law, fact that cooperation clause in fire policy did not specify "income" or "income tax returns" did not obviate insured's duty to provide such information to insurer investigating suspected arson. N.Y.McKinney's Insurance Law § 3404(e).

[11] Insurance 217 ⚷3205

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3203 What Constitutes Cooperation; Failure to Cooperate
217k3205 k. Materiality in General. Most Cited Cases
(Formerly 217k514.17(4))
Materiality of information requested from insured under insured's duty to cooperate is not determined by ultimate importance of information to insurer but rather its relevance to investigation at the time asked. N.Y.McKinney's Insurance Law § 3404(e).

[12] Insurance 217 ⚷3206

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3203 What Constitutes Cooperation; Failure to Cooperate
217k3206 k. Providing Information in General. Most Cited Cases
(Formerly 217k514.17(3))
Under New York law, it is error of law to require insurer to provide insured one more chance to provide material information when insured's prior conduct demonstrates willful failure to cooperate. N.Y.McKinney's Insurance Law § 3404(e).

[13] Insurance 217 ⚷3173

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3173 k. Documents, Records and Information in General. Most Cited Cases
(Formerly 217k548)
Under New York law, insured willfully violated cooperation clause of fire policy by failing to provide insurer with materially relevant financial information regarding her tax returns and income in connection with insurer's investigation into suspected arson fire. N.Y.McKinney's Insurance Law § 3404(e).

*95 Ernest O. Carrozza, Peekskill, NY, for plaintiff.
Stuart D. Markowitz, Feldman and Rudy, P.C., Westbury, NY, for defendant.

MEMORANDUM AND ORDER

TRAGER, District Judge.
[1] This action arises from the defendant's denial of plaintiff's claim under her fire insurance policy for the losses suffered as the result of a fire that occurred in her house on February 22, 1993. Suit was brought under diversity jurisdiction, although a 42 U.S.C. § 1982 claim has also been alleged on the basis of plaintiff's spouse's ethnicity (Israeli).[FN1] Defendant is an Illinois corporation. New York State law has been applied without objection.

FN1. 42 U.S.C. § 1982 guarantees to all citizens the "rights enjoyed by white citizens to inherit, purchase, lease, sell, hold and convey real and personal property." Jews and Arabs (and presumably Israelis) are covered under this provision, based on the definition of race in the Reconstruction era. *See Shaare Teflla Congregation v. Cobb,* 481 U.S. 615, 617, 107 S.Ct. 2019, 2021, 95 L.Ed.2d 594 (1987); *U.S. v. Gelb,* 881 F.2d 1155, 1161 (2d Cir.1989); *Emanuel v. Barry,* 724 F.Supp. 1096, 1103 (E.D.N.Y.1989).

Plaintiff's complaint alleged seven causes of action. The first three causes of action are based on defendant's denial of the coverage provided under plaintiff's Deluxe Homeowners Policy: (1) property damage and losses consequent to a forced sale of the damaged home; (2) additional living expenses; and (3) loss of use of residence. The fourth cause of action claims consequential damages resulting from plaintiff's sale of the fire-damaged house for a price below its previous market value. The fifth cause of action arises under New York General Business Law § 349 and asserts a claim for punitive damages and legal fees in addition to the economic losses previously alleged. The sixth cause of action alleges, under 42 U.S.C. § 1982, that Allstate "engages in a pattern of denying claims to persons of Middle Eastern and/or Israeli backgrounds without basis or justification." Compl. ¶ 33. The seventh cause of action asserts claims for negligent and/or intentional infliction of emotional distress in connection with defendant's insistence that plaintiff remain in the United States to participate in the claims evaluation process during a period in which plaintiff's mother was dying in Israel.

On October 6, 1995, defendant's motion to dismiss was granted with respect to plaintiff's fourth cause of action, her claim for consequential damages under the contract, on the authority of *Harriman v. Norfolk & Dedham Mutual Fire Ins. Co.*, 172 A.D.2d 585, 586, 568 N.Y.S.2d 820 (2d Dept.1991) (holding that consequential damages beyond the limits of an insurance policy are generally not recoverable in actions on insurance policies because they are too speculative). *See* Oral Argument 10/6/95 Tr. at 2-4. Defendant's motion to dismiss the fifth, sixth and seventh causes of action, (the claims under N.Y. Gen. Bus. L. § 349, 42 U.S.C. § 1982, and for intentional/negligent infliction of emotional distress), was denied at the same time, although discovery with regard to these causes of action was stayed. *See id.* at 10-14. Subsequently, discovery proceeded on plaintiff's first, second and third causes of action, which were based on coverage under her homeowner's policy.

Defendant has moved for summary judgment on two of its thirteen affirmative defenses: failure to cooperate and intentional concealment. Specifically, defendant first asserts that "by failing to provide [Allstate] with her 1991 and 1992 tax returns, and by repeatedly failing to provide [Allstate] with information regarding how much money she had earned in 1991 and 1992, [Harary] has breached the terms and conditions of the cooperation clause of the insurance policy." FN2 *96 Markowitz Aff. ¶ 6, attached to Def.'s Mot. for Summ. J. ("Def.'s Mot."). Second, Allstate asserts that it is also entitled to summary judgment because "by intentionally refusing to provide [Allstate] with information regarding how much money she earned in 1991 and 1992, plaintiff has violated the concealment or fraud provisions of [her] policy, thereby voiding [her] policy of insurance." FN3 *Id.* Plaintiff replied and cross-moved for dismissal of defendant's nine affirmative defenses and for summary judgment.

FN2. The policy at issue contains a cooperation clause in section 1 ("Conditions"):

3. What you must do after a Loss In the event of a loss to any property that may be covered by this policy, you must:

. . . . .

(d) Give us all accounting records, bills, invoices and other vouchers, or certified copies, which we may reasonably request to examine, and permit us to make copies.

. . . . .

(f) As often as we reasonably require: (1) show us the damaged property. (2) submit to examinations under oath and sign a transcript of the same.

Allstate Policy p. 18, Ex. A to Lambrianides Aff. attached to Def's Mot. for Summ. J.

FN3. The policy also contains a clause voiding the policy in case of fraud or concealment:

> Concealment or Fraud: This policy is void if it was obtained by misrepresentation, fraud or concealment of material facts or if you intentionally conceal or misrepresent any material fact or circumstance, before or after loss. We do not cover any other insured person who has concealed or misrepresented any material fact or circumstance, before or after a loss. If it is determined that this policy is void, all premiums paid will be returned to you since there has been no coverage under this policy.

Id. at 6.

Background

The following discussion, as required on a motion for summary judgment, views the evidence and all reasonable inferences in the light most favorable to the non-movant which, for purposes of defendant's summary judgment motion, is the plaintiff.

1. Plaintiff's and her Husband's Financial Circumstances Prior to the Fire

Plaintiff purchased the house in 1981 with her first husband and became its sole owner after their divorce. *See* Harary Aff. ¶ 3 attached to Pltf.'s Cross-Mot. for Summ. J. ("Harary Aff."); Refinancing Appl. dated October 18, 1991, Ex. X, Def.'s Mot.FN4In 1991, Harary sought to refinance her house and did so in 1992. It was appraised at that time, although she was unable to remember the appraised value. *See* Deposition Tr. of Zehava Harary ("Harary Dep.") at 46-47, Ex. D, Def.'s Mot.

FN4. At the time of the fire Harary had been remarried to Shlomo Ben-David for five years. *See* Allstate Claim Diary at 13, 17, Ex. B, Pltf.'s Cross-Mot. for Summ. J.

Defendant has submitted records of Harary's refinancing application and other dealings with her mortgage company, Prudential Home Mortgage, that it obtained from that company. *See*"Kadilac Mortgage Bankers Ltd. Residential Loan Application," Ex. X, Def.'s Mot. The two 1991 applications for refinancing were signed by plaintiff and (in addition to simple refinancing) included an application for an increase of $67,500 in plaintiff's total indebtedness, from $147,500 to $215,000. This request was apparently granted because the Prudential mortgage was approximately $215,000. *See* Allstate Claim Narrative at 14, Ex. B, Pltf.'s Mot. On the application forms, Harary's monthly income was listed as $10,800, the value of the house was $550,000 and the value of the business owned by Harary was $1,500,000. *See* Ex. X, Def.'s Mot. Plaintiff has not represented that these forms accurately depict her income and assets nor has she represented that she was unaware of the contents of the two applications, both of which she signed in application for a mortgage whose proceeds she does not dispute receiving.FN5

FN5. Plaintiff notes that these documents were not in her possession during her deposition by Allstate. As discussed below, plaintiff claims that the 1991 and 1992 income tax forms provided to the defendant by Prudential Mortgage Co. "were never intended to be filed with the IRS."Harary Aff. ¶ 12. She has not, however, denied her role in completing the refinancing applications provided from the Prudential files. Her signature is on both the handwritten version dated October 18, 1991 and the typed version dated November 16, 1991. *See* Ex. X, Def.'s Mot.

Using proceeds Ben-David received from the sale of a house in Israel, Harary and Ben-David renovated the house extensively prior to the fire. *See* Harary Aff. ¶ 4. The *97 refinancing application dated October 18, 1991 cites "complete renovation of bathrooms plus 2d floor refurnish, etc (see att. Pd.

Bills)" as the reason for refinancing while the application dated November 16, 1991 gives "Repairs to Property" as the purpose. Ex. X, Def.'s Mot. The finished basement in which they were living at the time of the fire in February 1993 was also renovated. *See* Harary Dep. at 55, Ex. D, Def.'s Mot.

During the summer of 1992, Harary attempted to sell the house. *See* Harary Dep. at 43-51, Ex. D, Def.'s Mot. Harary reported having dealt with realtor Jon Sobel and his agent, Jackie Cohen, beginning in April 1992. The house was initially listed with an asking price of $600,000; however, it was rented in August 1992. Sobel recalled that Harary was willing to sell for $450,000, a figure he viewed as still too high. He thought it would sell for between $350,000 and $400,000. See Deposition Tr. of Jon Sobel at 10-12, Ex. E, Def.'s Mot. Harary avers that she "turned down at least three offers in the range of $350,000 because I felt the house was worth more than that." Harary Aff. ¶ 5.

Plaintiff's policy with Allstate was called a "Deluxe Homeowners Policy" with a $270,000 limit on liability. *Id.* ¶ 16. The policy submitted by Allstate includes a $280,000 limit of liability for "Dwelling Protection." *See* Allstate Declaration and Policy, Ex. 1, Gus Lambrianides Aff., Ex. AA, Def.'s Mot. Plaintiff claims, and defendant does not dispute, that the insurance limit was an underestimate of the value of the house. Defendant's investigators estimated the market value of the dwelling as $425,000 and its replacement cost as $375,000. See Allstate Claim Diary at 6, Ex. B, Pltf.'s Mot.

In August 1992, plaintiff rented the first and second floors of her house as well as part of the basement to Mr. and Mrs. Rudle, a Russian couple, for $1,800 per month, through Sobel's agency. Prior to this rental, plaintiff, her children, and Ben-David lived in the entire house. Harary explained the rental resulted from a phone call from Jackie Cohen: "[S]he said, you know 'Zehava, you know, if we can't sell or it can't happen, you can't wait, maybe we can rent. I have a very nice couple.' " Harary Dep. at 53, Ex. D, Def.'s Mot. The Rudles paid two months' rent as security. *See id.* Simon Rudle stated that Harary told him: "She cannot afford the house and everything." Deposition Tr. Simon Rudle ("S. Rudle Dep.") at 46, Ex. F, Def.'s Mot. Plaintiff stated at her deposition that she rented the house because: "I wanted to come and go freely to Israel." Harary Dep. at 41, Ex. D, Def.'s Mot. Her mother, who lived in Israel, was ill in this period and subsequently died. *See id.* at 43. Simon Rudle also testified: "I remember very bad she wanted to move to Israel because relative, mother was ill." S. Rudle Dep. at 47, Ex. F, Def.'s Mot. Upon renting the house plaintiff and her husband moved into "one big room" in the basement, storing "a lot of clothes and personal things ... in the attic." Harary Dep. at 54-55, Ex. D, Def.'s Mot. The children no longer lived in the house. See S. Rudle Dep. at 46, Ex. F, Def.'s Mot. The door between the Rudles' portion of the house and that occupied by plaintiff and Ben-David had no lock, and the Rudles stated that plaintiff and Ben-David repeatedly entered their apartment despite being asked not to. *See* Deposition Tr. L. Rudle, page number missing, Ex. J, Def.'s Mot. Harary noted that they used the attic for storage. *See* Harary Dep. at 55, Ex. D, Def.'s Mot.

2. The Fire

Plaintiff states that she and her husband had planned to go to Atlantic City on the night of the fire but canceled the plan because of snow. *See* Harary Aff. ¶ 5. Instead, plaintiff went to play cards at the home of a friend about 7:30 p.m. *See id.* Ben-David stated that he was aware that the tenants had gone abroad at least a week before the fire, and that he had "supervised" the house in their absence. See Deposition Tr. Shlomo Ben-David ("Ben-David Dep.") at 44-45, Ex. I, Def.'s Mot. Ben-David testified that he watched television that night and called to see if there was work available for him; he was a limousine driver. *See* Ben-David Dep. at 54, Ex. L, Def.'s Mot.

About 10:00 or 10:30 p.m., about an hour before he fell asleep, Ben-David heard some "dragging" noises upstairs. He stated that the noises lasted for about five minutes, and *98 seemed to come from an upstairs portion of the house that had a ceramic tile floor. *See id.* at 56-59. Although he knew that the tenants were abroad, he did not investigate the source of the noises. *See id.* at 58. Ben-David was awakened about 1:00 a.m. by smoke. *See id.* at 64. After he became aware of the quantity of smoke, Ben-David went to the phone and, inexplicably, attempted to call his employer to find out why he had not been called for work. *See id.* at 66, 68, 69. After finding the phone was dead, he got dressed and went outside. *See id.* at 73. He saw flames coming out of the attic and went and knocked on the door of a neighbor. *See id.* at 77-78.

As noted, when the fire occurred the tenants (the Rudles) were abroad so that only Ben-David was present. *See* Ben-David Dep. at 44-45, 58, Ex. I, Def.'s Mot. When the Rudles returned from Switzerland, they found that a number of items had been stolen from their apartment, including a new 36" television that Mr. Rudle (a world class medal-winning weight lifter in Russia) estimated would require three to four people to lift, two large, heavy bronze vases, a marble table, and two heavy chairs. *See* Deposition Tr. L. Rudle at 51, Ex. K, Def.'s Mot.; S. Rudle Dep. at 66-67, Ex. H, Def.'s Mot. The Rudles did not file a report with the police or a claim with their insurance company for these items. *See* S. Rudle Dep. at 66-67, Ex. H, Def.'s Mot. Mr. Rudle questioned the feasibility of moving these pieces of furniture during the five minute period that Ben-David reported hearing noises above him or at any time without waking Ben-David. Mr. Rudle observed that the entryway was difficult for moving furniture: "Door is terrible because it got the steps and not convenient steps. Very narrow." S. Rudle Dep. at 51, Ex. K, Def.'s Mot. He also stated:

I don't understand was the fire if he sleep downstairs. You ask the weight of the TV. I weight lifter. I was Olympic gym in Russia, eight years national champion, silver, bronze and gold medal. It's impossible. Two men cannot lift this TV without something-you know-like the belts, special belts. It's terrible. I don't know how he sleep.

Id. at 51-52.

The New York City Fire Department Bureau of Fire Investigation filed a report on the fire listing the cause of the fire as "INCENDIARY." The report stated, in a section titled "Origin and Extension":

Examination showed that the fire originated in the [hallway closet], on the second floor, in the East hallway closet, in combustible material: TOWELS/LINENS. The fire extended to center hallway walls, ceiling, and West closet area. The fire further extended vertically, via open flame, to the floor, walls, ceiling and contents of attic area.

City of New York Fire Department, "Fire and Incident Report," Ex. C, Def.'s Mot. Plaintiff claims, without submitting either a supporting affidavit or deposition testimony: "Following the fire, plaintiff was advised by a member of the New York City Fire Department that the fire was apparently set by a burglar." Pltf. 3(g) Statement ¶ 8. Presumably this refers to the items stolen from the Rudles and the noises heard for about five minutes by Ben-David. No criminal investigation of the alleged burglary was undertaken.

3. Allstate Investigation

Learning that the Fire Department found the fire was incendiary in origin, Allstate began an investigation of Harary's claim. Allstate retained an expert, Charles L. Casale of O'Neil Associates, who confirmed that the fire was incendiary in origin. See Lambrianides Aff.¶¶ 6-7, attached to Def.'s Mot. Allstate also learned that Harary had put the house up for sale in summer 1992, and had then let it to the Rudles in September 1992, moving into what was essentially a studio apartment in the basement. *See id.*¶¶ 8-10.

Allstate further learned that the tenants were in

Europe and that Ben-David was home by himself in the basement apartment at the time of the fire. Allstate also asserts that it learned that there were no signs of forcible entry into the upstairs portion of the house, but it has presented no affidavit or testimony to support this statement. *See id.**99 ¶¶ 11-12.[FN6] It also learned that it was snowing heavily on the night of the fire. *See id.* ¶ 13. Although Harary and Ben-David made Allstate aware of their view that the fire was set in the course of a burglary, Allstate questioned this explanation on the basis of the heavy snow on that night, the absence of evidence of forcible entry, and the presence of two vehicles in the driveway of the house. *See id.* ¶ 14.

FN6. The basis for this statement appears to be the Allstate Claim Narrative, Ex. B, Pltf.'s Mot.

Based on the information obtained from this investigation, Allstate determined that Examinations Under Oath (EUOs) were necessary; Allstate conducted EUOs of Harary on August 16 and 26, 1993 and Ben-David on December 10, 1993. *See id.* ¶ 15. During her depositions, Harary stated that she did not file tax returns in 1991 and 1992, the two years prior to the fire, and had no copy of her 1990 return. *See* Harary Dep. at 31-33, Ex. M, Def.'s Mot. After Harary testified that she had not filed tax returns in 1991 and 1992, Allstate requested that she provide her 1990 tax return and an estimate of her 1991 and 1992 income. Harary testified that since 1993 she had been earning $180 per week. *See id.* at 31-35. Ben-David estimated that he earned between $45-55,000 in 1992, but admitted that he had been dismissed from his job for undisclosed reasons in 1993. *See* Deposition Tr. Shlomo Ben-David at 15-16, Ex. A, Pltf.'s Mot. At her subsequent EUO Harary testified that Ben-David was making $5,000 per month in 1993. *See* Harary Dep. at 34, Ex. M, Def.'s Mot. During the EUO, Allstate twice reiterated its request to Harary to provide the 1991 and 1992 income figures for Ben-David and Harary. *See* Harary Dep. at 32, Ex. M, Def.'s Mot.; Harary Dep. at 9, Ex. *N*, Def.'s Mot.

Allstate reiterated its request for the 1991 and 1992 income figures to Harary, in letters to her then-attorney, Barbara Matarazzo, Esq., on August 23, 1993 and on August 31, 1993, warning "that [Harary's] obligations under the terms and conditions of her policy of insurance with Allstate cannot be fulfilled unless and until she ... has provided our office with all of the information and documentation called for during her Examination Under Oath."Letter from Markowitz to Matarazzo of 8/23/93, Ex. O Def.'s Mot.; Letter from Markowitz to Matarazzo of 8/31/93, Ex. P, Def.'s Mot. Allstate extended this warning with respect to its requests at Ben-David's EUO in a letter dated December 17, 1993. *See* Letter from Markowitz to Carrozza of 12/23/93, Ex. Q, Def.'s Mot. However, as plaintiff points out, in response to a question from Allstate during his deposition, Ben-David had estimated his income for 1992 as $45-55,000. *See* Deposition Tr. Shlomo Ben-David at 15, Ex. A, Pltf.'s Mot. Ben-David does not, however, appear to have provided an estimate of his 1991 income.

Harary's attorney, Ernest Carrozza, Esq., responded to Allstate's requests in a letter dated March 2, 1994. This letter provided, inter alia, information about the renovations to the home, as well as Harary's credit card account information, and documents relating to the lease with the Rudles. *See* Letter from Carrozza to Matarazzo of 3/2/94, Ex. R, Def.'s Mot. The letter stated "to be supplied" for the following inquiries: "money earned '92 for Harary," (item 13), "money earned '91 for Harary" (item 14), and "Income in 1991 & 1992 for Mrs. Harary and Mr. Ben-David," (item 46). *Id.* The letter stated "do not have" to the following requests: "Tax returns, 1990" (item 4), "Checking account, Greenpoint Savings 2/92-2/93," (item 5), "Appraisal of house" (item 6), "Credit card statements 2/92-2/93," (item 10). *Id.* In a letter dated March 23, 1994, Allstate objected to both the form of this response and the missing material. Allstate's letter also stated that a "failure to provide all of the information and documentation called for during their /// [EUOs] would be a material breach of the terms and conditions of their policy ///" Letter from Matarazzo to Carrozza of 3/23/94, Ex. S, Def.'s Mot.

Harary replied by affidavit dated May 3, 1994, again asserting: "My income for 1992 [and 1991] will be supplied," and that "1991 and 1992 income for Mr. Ben-David is unknown to me at this time." Ex. T, Def.'s Mot. On June 13, 1994, her [then] attorney, Ernest O Carrozza, wrote:

*100 Mrs. Harary has now provided you with all requested documents in her possession and authorizations for anything she does not have, *with the exception of tax returns.* I have been advised that her accountant is working on the returns, but I do not know when he will have them completed. It is our position, however, that Allstate's decision with respect to coverage cannot be delayed indefinitely, regardless of the filing of the tax returns.

Allstate has been investigating this claim since February of 1993. If payment is not made by the end of the month, we will have no alternative but to commence litigation.

Letter from Carrozza to Matarazzo of 6/13/94, Ex. U, Def.'s Mot. ("Carrozza letter") (emphasis added).

Allstate obtained from Prudential Home Mortgage ("Prudential"), a copy of a transmittal letter dated October 7, 1993, from Harary's real estate attorney, Arthur Susnow, to Prudential that states that he is transmitting copies of her 1991 and 1992 tax returns he had obtained from Harary's accountant. *See* Ex. V; Ex. W, Def.'s Mot.[FN7] The date of this letter is two months after the deposition in which Harary stated she had not filed tax returns in 1991 and 1992. These returns claim adjusted gross income of $60,435 for 1992 and $120,480 for 1991. See Ex. W, Def.'s Mot.

FN7. Plaintiff contends that defendant obtained this letter after it denied her claim on June 28, 1994. *See* Pltf.'s 3(g) ¶ 21. It is not clear from Allstate's 3(g) statement when it obtained this letter. Assuming that Harary is correct, the fact that Allstate obtained the letter after it denied the claim is not relevant since plaintiff had failed to provide any tax information prior to the denial of the claim.

[2] Plaintiff explained the 1991 and 1992 income tax forms as having been prepared by Barbara Lustig, a mortgage consultant with Kadilac Mortgage Bankers. For several reasons, this explanation is particularly hard to credit, even when made by a non-movant on a motion for summary judgment. Plaintiff has provided no explanation of why Lustig, who, from the materials submitted, appears to have been involved in Harary's *1991* mortgage applications (which were dated October and November 1991), would have completed *1991 and 1992* tax forms, since these returns would ordinarily be prepared in early 1992 and 1993, respectively, and the financing for this loan was already in place by the time of the fire, February 1993. Plaintiff has also offered no explanation why, if, as she asserted on January 1996, the form was prepared by Lustig, *see* Harary Dep. at 21-22, Ex. Y, Def.'s Mot.; Harary Dep. at 33, Ex. AA, Def.'s Mot., Lustig denies having done so. *See* Deposition Tr. Barbara Lustig at 30, Ex. Z, Def.'s Mot. Nor has she provided an explanation for why her accountant would have possession of them. Harary offers this explanation: "[T]hese documents were not prepared by me, they were not signed by me and they were never submitted to the Internal Revenue Service. They are not tax returns. They were never intended to be filed with the IRS."Harary Aff. ¶ 12. Essentially, her explanation comes down to this: the tax returns were part of a fraud on Prudential to obtain the refinancing, and therefore there was no reason to turn them over to Allstate. Although her explanation for how these returns came to be prepared is not entirely credible, it seems clear that these documents are not, in fact, her 1991 or 1992 tax returns.[FN8]

FN8. Harary's assertion that the 1991 and 1992 income tax forms were prepared by Lustig arguably raises a dispute about a genuine issue of material fact, at least as to the issue of who prepared the returns, and, inferentially, who would have had possession and knowledge of them. However, a non-moving party's conclusory assertions cannot defeat a motion for summary judgment, especially when, as here, plaintiff's assertions are incredible as a matter of law. *See Rickert v. Travelers Insurance Co.*, 159 A.D.2d 758, 760, 551 N.Y.S.2d 985, 987 (3d Dept.1990) (affirming lower court grant of summary judgment despite plaintiff's claim that his lack of recollection presented an issue for trial and stating: "Supreme Court could properly find that plaintiff's conclusory, self-serving averments were incredible as a matter of law.").

Plaintiff gave an authorization to Allstate to obtain tax returns from IRS, which, although dated August 26, 1993, is described by plaintiff's attorney as having been *"eventually* provided to defendant." Carrozza Affirm. ¶ 9, attached to Pltf.'s Mot. (emphasis added). No date is given for the delivery of ***101** this authorization. However, in the Carrozza letter, which is dated June 13, 1994, Harary's attorney stated: "Mrs. Harary has now provided you with all requested documents in her possession and authorizations for anything she does not have, *with the exception of tax returns.*" Carrozza letter (emphasis added). Thus, plaintiff has not presented any evidence that the IRS authorization was provided to Allstate prior to the claim denial.

The Carrozza letter also stated: "Allstate has been investigating this claim since February of 1993. If payment is not made by the end of the month [June 1994], we will have no alternative but to commence litigation." *Id.* Allstate denied Harary's claim by letter dated June 28, 1994, sixteen months after the fire, citing the following reasons:

intentional setting and/or procuring of the fire in question; based upon violations of those policy provisions relating to concealment or fraud; the intentional acts exclusion; based upon the increase in hazard provisions of the policy and based upon the failure to supply all of the information and documentation called for during the Examinations Under Oath.

Letter from Allstate to Harary dated June 28, 1994, Ex. A, Def.'s Mot. Reply Aff. Harary commenced suit on January 18, 1995.

Discussion

1. Summary Judgment Standard

The standard for deciding motions for summary judgment is specified in the Federal Rules of Civil Procedure:

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986). "On a summary judgment motion, the court is not to weigh the evidence, or assess the credibility of witnesses, or resolve issues of fact,"*Rodriguez v. City of New York,* 72 F.3d 1051, 1061 (2d Cir.1995), but, as the Supreme Court noted in *Celotex Corp. v. Catrett:* "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses,"477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

Although all reasonable inferences of the non-movant are to be credited, the non-movant must offer some "concrete evidence from which a reasonable juror could return a verdict in his favor.... The movant has the burden of showing there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Anderson* 477 U.S. at 256, 106 S.Ct. at 2514. Not all disputed facts are a basis for denying summary judgment. "The non-movant may defeat summary judgment only by producing specific facts showing that there is a genuine issue of material fact for trial." *Samuels v. Mockry,* 77 F.3d 34, 35 (2d Cir.1996). Thus, a party who bears the burden of proof on an issue at trial cannot avoid summary judgment through mere assertions. *See Gottlieb v. County of Orange,* 84 F.3d 511, 518 (2d Cir.1996) (citing cases).

2. Arson Investigation Standards

It is well established in New York law "that direct proof of arson is seldom available and, therefore, [arson] can be established in civil cases by circumstantial evidence," of which the financial position of the insured is often critically important. *Weed v. American Home Assurance Co.,* 91 A.D.2d 750, 751, 458 N.Y.S.2d 27, 28 (3d Dept.1982) (citing *Shawanga Holding Corp. v. New York Prop. Ins. Underwriting Ass'n,* 57 A.D.2d 677, 394 N.Y.S.2d 69 (3d Dept.1977)). *See also Elgi Holding, Inc. v. Insurance Co. of N. Am.,* 511 F.2d 957, 959 (2d Cir.1975). "[I]t is well settled that questions regarding an insured's personal finances are material and relevant to the investigation." *Ashline v. Genesee Patrons Cooperative Ins. Co.,* 224 A.D.2d 847, 638 N.Y.S.2d 217, 219 (3d Dept.1996).

[3] Defendants, at trial, have the burden of presenting "clear and convincing evidence that the fire was incendiary [e.g., not accidental]*102 in origin, and that the plaintiffs had a motive and the opportunity to commit the crime." *3910 Super K, Inc. v. Pennsylvania Lumbermens Mutual Ins. Co.,* 219 A.D.2d 589, 631 N.Y.S.2d 364, 366 (2d Dept.1995). Here, the incendiary nature of the fire is undisputed. Allstate's suspicions regarding Harary's motives were reasonably aroused by, first, Harary's having increased the indebtedness on the house (accepting that at the time it denied the claim Allstate was unaware of Harary's apparent exaggeration of her assets and income in her refinancing applications); second, her placing the house up for sale; and third, renting almost the entire house to tenants while retaining only a single basement room for herself and her spouse.

3. Failure to Cooperate

[4][5][6] Harary's insurance policy contains a cooperation clause setting forth her duty to cooperate with Allstate. In New York, the scope of the duty a cooperation clause establishes is prescribed by statute.[FN9] New York courts have made it clear that this duty is a broad one: an insured's duty to cooperate "is much broader than the right of discovery under the CPLR. By its terms the insured promises to render full and prompt assistance to discover the facts surrounding the loss and anything less results in a breach of contract." *Dyno-Bite, Inc. v. Travelers Cos.,* 80 A.D.2d 471, 474, 439 N.Y.S.2d 558, 560-61 (4th Dept.1981). The insured's obligation to cooperate is not met by "partial testimony or by promises of evidence to be supplied in some indefinite future.... "*Id.* at 474, 439 N.Y.S.2d at 561.

FN9. N.Y. Insur. L. § 3404(e) (McKinney 1996), which specifies the form of a fire insurance contract, provides:

> The insured, as often as may be reasonably required, ... shall submit to examinations under oath by any person named by this Company, and subscribe the same; and as often as may reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representatives, and shall

permit extracts and copies thereof to be made.

The standard terms may be varied, so long as, "the policy contains, with respect to the peril of fire, terms and provisions no less favorable to the insured than those contained in the standard fire policy."§ 3404(f)(1)(A).

Allstate's policy provided:

In the event of a loss to any property that may be covered by this policy, you must:

d) Give us all accounting records, bills, invoices and other vouchers, or certified copies, which we may reasonably request to examine, and permit us to make copies.

.....

f) As often as we reasonably require: ...

2) submit to examinations under oath and sign a transcript of the same.

The company is entitled to obtain, promptly and while the information is still fresh, "all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights to enable them to decide upon their obligations, and to protect them against false claims." *Id.* (quoting *Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 94-95, 3 S.Ct. 507, 514-515, 28 L.Ed. 76 (1884)). Further, while the affirmative defense of "willful concealment or misrepresentation of material facts" requires proof by clear and convincing evidence, failure to cooperate need be proved only by a preponderance of the evidence. *See Ashline v. Genesee Patrons Cooperative Ins. Co.*, 224 A.D.2d 847, 638 N.Y.S.2d 217, 219 (3d Dept.1996).

A fire insurance claimant who is suspected of arson has a significant burden of cooperation. Although the plaintiff stresses the "heavy burden" on an insurer to establish non-cooperation, Pltf. Brf. at 7, the cases cited by the plaintiff almost uniformly involved third party recovery issues under insurance other than fire insurance, where the cooperation requirement is far less stringent. The basis for this distinction was explained in *Dyno-Bite:*

A distinction may be drawn, however, between a court's natural reluctance to see an accident victim deprived of his source of payment because a liability carrier claims that its assured has failed to cooperate, and an indemnity carrier denying payment to its insured because the insured has failed to cooperate in discovering a possible arson. The injured accident claimant *103 is an innocent victim of the insured's failure to cooperate. A fire insured, however, controls his own fate....

Dyno-Bite, 80 A.D.2d at 476, 439 N.Y.S.2d 558. Thus, in *Kagan v. Taylor,* 558 F.Supp. 396, 398 (E.D.N.Y.1983), then-District Judge Joseph M. McLaughlin specifically contrasted the cooperation requirement under fire insurance policies with those under the All Risks Policy in the case before him: "A comparison of the Lloyd's All Risks Policy's cooperation clause with that of the New York standard fire insurance policy discloses that the former is far less explicit about conditions precedent to suit."

[7][8] Plaintiff's repeated refusals to answer questions about her 1990-92 income essentially resemble an assertion of her Fifth Amendment privilege against self-incrimination. It is well-settled, however, that an insured may not use her Fifth Amendment privilege as a sword against her fire insurer. *See Dyno-Bite,* 80 A.D.2d at 476, 439 N.Y.S.2d 558 ("A fire insured, however, controls his own fate and neither an individual insured nor the principals of a corporate insured may use the Fifth Amendment privilege to frustrate the fire insurers' defenses to their action."). Even if plaintiff's refusal to provide the income information was motivated by a desire to avoid disclosing a fraud on Prudential, this reason would not obviate her obligation to Allstate. As the Supreme Court stated in a similar context, "the fraud attempted upon the insurers ... is not lessened because the motive that in-

duced it was something in addition to the possible injury to them that it might work." *Claflin,* 110 U.S. at 96-97, 3 S.Ct. at 515-516. Thus, unless Harary can show that genuine issues of material fact remain or that the tax returns were immaterial to Allstate's investigation, Allstate is entitled to summary judgment in its favor because of her otherwise unexplained failure to provide them.

4. Harary's Tax Returns and their Materiality

[9][10] In support of her argument that defendant is not entitled to her tax returns, plaintiff cites the New York Court of Appeals' holding in *Happy Hank Auction Co. v. American Eagle Fire Ins. Co.,* 1 N.Y.2d 534, 538-39, 154 N.Y.S.2d 870, 136 N.E.2d 842 (N.Y.1956):

As to plaintiff's refusal to show or give defendants access to copies of plaintiff's tax returns, there not only is an arguable question as whether such production was required by the policies ... but a further question as to whether the inventory figures thereon [19 months old] would be material to the dispute as to the fire damage.

However, the dispute in *Happy Hank* concerned the value of a damaged inventory rather than arson allegations; furthermore, the inventory figure sought was for a period nineteen months prior to the loss. Here, Allstate sought information about the insured's income for the two years immediately prior to the fire; such information was obviously necessary to any assessment of the insured's financial position. None of the New York Court of Appeals' three references to *Happy Hank* since 1981 are for the proposition that insurers may not obtain the tax returns of their insureds. In fact, *Lentini Bros. Moving & Storage Co., Inc. v. New York Property Insurance Underwriting Ass'n,* 53 N.Y.2d 835, 837, 440 N.Y.S.2d 174, 175, 422 N.E.2d 819 (N.Y.1981), prefaces its citation of *Happy Hank* with a *cf.,* citing it in connection with a holding that: "[i]n view of the insured's unexcused and willful refusal to comply, there is no reason to deny summary judgment dismissing the complaint unconditionally." FN10 Plaintiff also argues, under the *104 principles that an insurance contract is construed against the insurer who drafted it and that the law disfavors forfeiture, that because the terms of the policy do not specify "income" or "income tax returns," the cooperation clause should not be enforced against her. This argument was specifically rejected by the Second Department in *2423 Mermaid Realty Corp. v. New York Prop. Ins. Underwriting Ass'n,* 142 A.D.2d 124, 534 N.Y.S.2d 999, 1003 (2d Dept.1988). There, the court held that the income tax returns of the principals of a corporation as well as those of the insured corporation were "relevant and material to any insurance company investigating a fire loss claim." *Id.* at 131, 534 N.Y.S.2d 999. The court also noted that "In view of the fact that direct proof of arson is seldom available .... [i]nformation gleaned from the tax returns of an individual insured or the officers of a corporate insured can be of crucial significance...." *Id.* at 130, 534 N.Y.S.2d 999 (citing *Elgi Holding, Inc. v. Insurance Co. of North Am.,* 511 F.2d 957, 959 (2d Cir.1975)). The *2423 Mermaid* court also cited *Averbuch v. Home Ins. Co.,* 114 A.D.2d 827, 494 N.Y.S.2d 738 (Dept.1985), and *Ausch v. St. Paul Fire & Marine Ins. Co.,* 125 A.D.2d 43, 511 N.Y.S.2d 919 (2d Dept.1987), for the principle that failure to provide personal tax returns breaches a substantial condition of the policy.

FN10. In *Deitsch Textiles, Inc. v. New York Property Ins. Underwriting Ass'n,* 62 N.Y.2d 999, 1002, 479 N.Y.S.2d 487, 468 N.E.2d 669 (N.Y.1984), the Appellate Division's *Happy Hank* decision (286 A.D. 505, 508, 145 N.Y.S.2d 206 (1st Dept.1955)) was cited for the proposition that " 'the contract of insurance being entire and indivisible, a cause of avoidance or forfeiture in respect to a part of the property insured affects the whole contract.' " *Jonari Management Corp. v. St. Paul Fire & Marine Ins. Co.,* 58 N.Y.2d 408, 417, 461 N.Y.S.2d 760, 764, 448

N.E.2d 427, 430 (1983) cites *Happy Hank* in connection with an issue of misrepresentation of loss.

The lone Second Circuit citation to *Happy Hank, C Suzanne Beauty Salon, Ltd. v. General Ins. Co. of Am.*, 574 F.2d 106, 110 (2d Cir.1978), was an affirmance of a district court's denial of summary judgment to the insurer under the cooperation clause. In *C Suzanne* the insurance company acceded to the insured's declining to appear at an examination under oath, never scheduled another, and failed to warn the insured of the consequences of voiding the policy. However, the circuit has since noted that this holding may have been called into question, even on its own, rather extreme facts. In *Rosenthal v. Prudential Property & Cas. Co.*, 928 F.2d 493, 495 (2d Cir.1991), the court noted that the New York Court of Appeals' affirmances of dismissals of actions against insurers "suggest that a finding of willfulness extinguishes any 'right' to a 'last opportunity.' " Thus, to the extent that plaintiff might be entitled to a "last opportunity," her willful non-cooperation has extinguished that opportunity.

Here plaintiff has represented, once by her attorney's letter and once in her own affidavit, that she would provide information about her income in 1991 and 1992, but has made no representations concerning any effort to do so. She now claims that she cannot recall her income for those years. Although plaintiff has stated several times that she would provide information about her 1991 and 1992 income, in her 1996 deposition she states only that she has not "had a chance" to compile an estimate of the amount of money she earned in 1991 and 1992, despite the fact that two and one half years had elapsed since she was first asked for the information at her August 1993 EUO. *See* Harary Dep. at 32, Ex. AA, Def.'s Mot. In 1996, after refusing to provide the information at her deposition, even though ordered by the court to respond, Harary has stated that: "It was, and is, impossible for me to recall the amount of my income for [1991 and 1992]." Harary Aff. ¶ 8. Nor has she presented any evidence demonstrating an effort to compile the information. Finally, as previously noted, she has disavowed the tax forms Allstate obtained from Prudential, asserting that she neither prepared nor signed them. *See* Harary Dep. at 33, Ex. AA, Def.'s Mot. Thus, rather than provide the requested information, plaintiff has provided only "conclusory, self-serving averments" that are "incredible as a matter of law." *Rickert v. Travelers Ins. Co.*, 159 A.D.2d 758, 760, 551 N.Y.S.2d 985, 987 (3d Dept.1990) (affirming lower court grant of summary judgment despite plaintiff's claim that his lack of recollection presented an issue for trial, the court stated: "Supreme Court could properly find that plaintiff's conclusory, self-serving averments were incredible as a matter of law.").

5. Issues of Fact Regarding Harary's Failure to Cooperate

Plaintiff contends that even if the court finds that there is evidence that she failed to cooperate, issues of fact exist with regard to her cooperation that must be presented for trial. Such a contention has been rejected by the Second Circuit: "[T]he New York Court of Appeals has held, 'without indicating approval' of *Pogo*,[FN11] that 'in view of the ***105** insured's unexcused and willful refusal to comply, there is no reason to deny summary judgment dismissing the complaint unconditionally.' ...We intend to follow this direction from New York's highest court." *Rosenthal v. Prudential Property & Casualty Co.*, 928 F.2d 493, 495 (2d Cir.1991).

FN11. Referring to *Pogo Holding Corp. v. New York Property Ins. Underwriting Ass'n*, 73 A.D.2d 605, 422 N.Y.S.2d 123 (2d Dept.1979), in which it was held "that

New York law allows a recalcitrant insured a 'last opportunity' to cooperate...." *Rosenthal* at 495. In *Rosenthal,* the court held that the plaintiff had had a last opportunity to cooperate when the district court denied the insurer's motion on the condition that plaintiff submit to an EUO. *See Rosenthal,* 928 F.2d at 495. As in *Rosenthal,* Harary has been allowed a last opportunity when, during a telephone conference, the court directed her to produce her 1991 and forward tax returns. *See* Calendar of 1/4/96, docketed as document number 14.

Plaintiff contests the materiality of her failure to provide the requested information, asserting that "[p]laintiff's inability to recall the amount of her income in 1991 did not in any way discourage, mislead or deflect the defendant's investigation." Pltf. Brf. at 19. Plaintiff places great emphasis on a recent Second Circuit case, *Pacific Indemnity Co. v. Golden,* 985 F.2d 51 (2d Cir.1993). This case, however, was based on Connecticut, not New York, law, and concerned a claim that the policy was voided by misrepresentation, not by failure of cooperation. There, also, the insured corrected the misrepresentation he made at an unsworn interview during his examination under oath. Harary has never provided any estimate of her 1991 and 1992 income or even any representations of any good faith effort to comply with her May 3, 1994 affidavit that this information "will be supplied." Furthermore, plaintiff's reliance on this case is misplaced, because determining whether a false statement is material cannot be equated with determining if a failure to cooperate has occurred. In the former, the question is whether the insurer would have acted differently, given the correct information. *See Pacific Indem.,* 985 F.2d at 56 (" 'False sworn answers are material if they might have affected the attitude and action of the insurer.' ") (quoting *Fine v. Bellefonte Underwriters Ins. Co.,* 725 F.2d 179, 184 (2d Cir.1984)). In contrast, a finding of a failure to cooperate on a material issue means that with regard to that issue the insured has failed to provide *any* information on that material issue. Even assuming, however, that a materiality analysis is proper, plaintiff's arguments are unavailing.

[11] Plaintiff argues that her 1991 and 1992 income were not "material" to Allstate's investigation, that she provided many documents and answered many questions but only refused to answer two. *See* Pltf. Brf. at 11. Further, plaintiff asserts that the information was not material to Allstate's determination to deny the claim: "Once Allstate had discovered that the fire was classified as incendiary, that Mr. Ben-David was at home at the time of the fire and that Mrs. Harary had attempted to sell the house in the months [before] the fire, nothing she said about her income was going to alter their evaluation of the claim." *Id.* at 12. This remarkable argument, if extended, would deny an insurer any right to cooperation from the insured where arson was reasonably suspected. This, in turn, would virtually guarantee that an insurer would be unable to deny coverage in any suspected arson where the level of proof was below that necessary to obtain a criminal conviction. Plaintiff's argument would render New York's statutory cooperation clause, as found in standard fire insurance policies, a nullity.

Furthermore, plaintiff's argument was rejected in *232 Broadway Corp. v. New York Prop. Ins. Underwriting Ass'n,* 206 A.D.2d 419, 421, 615 N.Y.S.2d 42, 43 (2d Dept.1994). In this case, the plaintiff had failed to provide requested items and had also provided conflicting loss information. The court found that

[Plaintiff] has had numerous opportunities to cure any deficiencies and has failed to do so. In any event, the alleged inability of [plaintiff] to previously recall the vast majority of the claims he now sets forth in his affidavit ... renders his testimony at the ... examinations under oath incredible as a matter of law. We therefore find that, as a matter of law, [plaintiff] has failed to cooperate with its insurers as required under its insurance policies. Such failure is a material breach of those policies. Its actions under those policies must therefore be dismissed.

Id. at 421, 615 N.Y.S.2d 42 (citations omitted). The court also held that "it was an *106 abuse of discretion to permit [plaintiff] this one last opportunity to provide the requested items,"*id.*, thus rejecting the dissenting judge's position that the facts of the case could not support a finding of "a willful pattern of noncooperation." *Id.* at 422, 615 N.Y.S.2d 42 (Balletta, P.J., dissenting).

Materiality is also not determined by the *ultimate* importance of the information to the insurer but rather its relevance to the investigation at the time asked. In *Fine v. Bellefonte Underwriters Ins. Co.*, 725 F.2d 179, 183 (2d Cir.1984), the court held:

The law is clear that the materiality of false statements during an insurance company investigation is not to be judged by what the facts later turn out to have been.... [T]he materiality requirement is satisfied if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding.

Thus the materiality of Allstate's inquiry regarding Harary's 1991 and 1992 income must be evaluated in August 1993, when it was first made, and before Harary's attorney had even forwarded the 1991 and 1992 tax forms prepared by her accountant to Prudential. No reasonable jury could find that a failure to provide any of this information was not material at this point in time.

Further, plaintiff's statement that "Mrs. Harary has been given no second or third chance to provide the requested information," Pltf. Br. at 10, is extraordinary, given the extensive correspondence between defendant and plaintiff's counsel warning of the consequences of her failure to provide the information. It can only be based on the narrow ground that she, for the first time, at her deposition in 1996 stated that she could not *recall* her 1991 and 1992 income. She had agreed at her Examinations Under Oath in August 1993 that she would complete the blanks left for her 1991 and 1992 income and, subsequently, submitted an affidavit that she would "supply" her 1991 and 1992 income. Even if it were true that Mrs. Harary had been given only one chance to supply the information, that chance came at a time that the court ordered her to provide the information-and she failed to do so.FN12

FN12. During a telephone conference held on January 4, 1996, plaintiff was ordered to produce tax returns from 1991 forward. *See* Calendar of 1/4/96, docketed as document number 14.

[12] As noted above, recent case law is clear that it is an error of law to require an insurer to provide the insured one more chance to provide material information when the insured's prior conduct demonstrates a willful failure to comply. The Court of Appeals for the Second Circuit, affirming a dismissal of suit against insurer for fire loss where arson was suspected, stated in *Rosenthal v. Prudential Property & Cas. Co.*, 928 F.2d 493, 495 (2d Cir.1991): "We note ... that New York courts have recently retreated from affording an insured a 'last opportunity' when the insured's refusal to cooperate is willful." The *Rosenthal* court had previously noted "When the insured's failure to fulfill his obligations under an insurance policy 'is indicative of a pattern of non-co-operation [sic] for which no reasonable excuse for noncompliance has been proffered,'... his conduct is properly deemed willful." *Id.* at 494 (quoting *Bulzomi v. New York Cent. Mut. Fire Ins. Co.*, 92 A.D.2d 878, 459 N.Y.S.2d 861 (2d Dept.1983)).

[13] Here, Harary's willful violation of the cooperation clause in her fire insurance policy with respect to facts materially relevant to Allstate's investigation of her claim has been established by far more than a preponderance of the evidence. Plaintiff does not, and indeed cannot, dispute that she has failed to provide Allstate with her 1991 and 1992 income, evidence of her financial status that is materially relevant to her fire loss claim on the incendiary de-

struction of her home. Plaintiff has failed to raise any material issue of fact on this defense that would warrant trial. Defendant's motion is therefore granted as to that portion of the motion seeking summary judgment on the ground that Harary failed to cooperate, thus breaching her policy. Thus, summary judgment is granted to defendant on plaintiff's first three causes of action.FN13

FN13. Defendant also moved for summary judgment on the ground of intentional concealment/misrepresentation. In New York, while non-cooperation may be proved by a preponderance of the evidence, a defendant must meet a higher standard of proof, that of clear and convincing evidence, in order to void a policy on the basis of intentional concealment or misrepresentation. *See Ashline v. Genesee Patrons Co-op. Ins. Co.*, 224 A.D.2d 847, 638 N.Y.S.2d 217, 219 (3d Dept.1996). Although the facts that support granting summary judgment on the ground that Harary violated the cooperation agreement lend support to summary judgment on this claim, it is not necessary to reach this issue in light of the judgment in Allstate's favor on the non-cooperation ground.

***107 6. Plaintiff's Remaining Claims**

At oral argument on a prior motion to dismiss, discovery was stayed on plaintiff's claims based on 42 U.S.C. § 1982, § 349 of New York's General Business Law, and the emotional distress claims, pending the disposition of the claims regarding the policy. At that time, although Allstate's motion to dismiss was denied, plaintiff was directed to move to amend her complaint to provide specific allegations in support of her additional claims, if she wished to pursue those claims; plaintiff's counsel indicated that he would move to amend the complaint. See Oral Argument 10/6/95 Tr. at 10-14. To date, plaintiff has not filed a motion to amend. Plaintiff may move to amend her complaint regarding the fifth, sixth, and seventh causes of action within thirty days from the date of the entry of the order granting summary judgment in defendant's favor on plaintiff's first three causes of action. If plaintiff does file an amended complaint, plaintiff shall file at the same time a letter explaining why the disposition of the first three causes of action would not preclude her from recovering under all of the remaining claims. If plaintiff chooses not to file a motion to amend, the court will treat plaintiff's remaining claims under a summary judgment standard. Summary judgment will be considered on the basis that because the first three causes of action were dismissed on the ground that plaintiff failed to cooperate, plaintiff now lacks standing to bring the remaining causes of action. Plaintiff may, therefore, either move to amend her complaint, or alternatively, to contest summary judgment.

Conclusion

The court grants the defendant's motion for summary judgment on plaintiff's first three causes of action, on the ground that plaintiff has failed to cooperate. Plaintiff's cross-motion for summary judgment is denied. Plaintiff may move to amend her complaint relating to the fifth, sixth, and seventh causes of action within thirty days of the date of this order. If plaintiff does not move to amend the remaining causes of action in the complaint within that time, the court will grant summary judgment to defendant on plaintiff's remaining causes of action on the ground that plaintiff has sustained no injury; thus, in lieu of moving to amend, plaintiff may elect to contest summary judgment. Such motion contesting summary judgment on this ground must also be made within thirty days of the date of this order.

E.D.N.Y.,1997.
Harary v. Allstate Ins. Co.
988 F.Supp. 93

END OF DOCUMENT

Peter H. Klee, State Bar No. 111707
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

Attorneys for Defendant Allstate Indemnity Company

FILED
SOUTH COUNTY
2008 MAY 23 P 3:51
CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SOUTH COUNTY JUDICIAL DISTRICT

ORALIA MARTINEZ, Plaintiff, v. ALLSTATE INDEMNITY COMPANY, Defendant.	Case No. 37-2008-00069884-CU-IC-SC **PROOF OF SERVICE** Judge: William S. Cannon Dept.: S-04 Comp. Filed: April 11, 2008

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is 600 West Broadway, Suite 2600, San Diego, California 92101-3372.

On May 23, 2008, I served true copies of the following document(s) described as:

- **PEREMPTORY CHALLENGE**
- **ALLSTATE'S NOTICE OF DEMURRER AND DEMURRER TO PORTIONS OF PLAINTIFF'S COMPLAINT**
- **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ALLSTATE'S DEMURRER TO PLAINTIFF'S COMPLAINT**
- **DEFENDANT ALLSTATE INSURANCE COMPANY'S NOTICE OF FOREIGN AUTHORITIES IN SUPPORT OF ITS DEMURRER TO PORTIONS OF PLAINTIFF'S COMPLAINT**

on the interested parties in this action as follows:

J. Manuel Sanchez, Esq.
J. MANUEL SANCHEZ & ASSOCIATES
482 W. San Ysidro Boulevard, Suite 3
San Ysidro, CA 92173
Tel: (619) 662-2080
Fax: (619) 662-2048

Attorneys for Plaintiff Oralia Martinez

☒ BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the address listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Luce, Forward, Hamilton & Scripps LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ BY FAX TRANSMISSION: I faxed a copy of the document(s) to the persons at the fax numbers listed in the Service List. The telephone number of the sending facsimile machine was 619.232.8311. No error was reported by the fax machine that I used.

☐ BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address cwiles@luce.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message, or other indication that the transmission was unsuccessful.

☐ BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 23, 2008, at San Diego, California.

Cheryl Wiles

CHERYL WILES

101095996.1

Peter H. Klee, State Bar No. 111707
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

FILED
SOUTH COUNTY
2008 MAY 23 P 3:57
CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

Attorneys for Defendant Allstate Indemnity Company

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SOUTH COUNTY JUDICIAL DISTRICT

ORALIA MARTINEZ ,

Plaintiff,

v.

ALLSTATE INDEMNITY COMPANY,

Defendant.

Case No. 37-2008-00069884-CU-IC-SC

PEREMPTORY CHALLENGE
[Code Civ. Proc. § 170.6]

Judge: William S. Cannon
Dept.: S-04
Comp. Filed: April 11, 2008

I, Peter H. Klee, declare:

I am a partner for Allstate Insurance Company ("Defendant") in this action. The Honorable William S. Cannon, the judge to whom the trial of this action has been assigned, is prejudiced against Defendant or interests of Defendant so that I believe Defendant cannot have a fair and impartial trial or hearing before said judge.

WHEREFORE, pursuant to the provisions of section 170.6 of the California Code of Civil Procedure, I respectfully request that this Court issue its order reassigning said case to another, and different, Judge for further proceedings.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed this 22 day of May 2008 at San Diego, California.

Peter H. Klee

Peter H. Klee

101090233.1

08 MAY 28 PM 1:33

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):	FOR COURT USE ONLY
Peter H. Klee (SBN 111707) Luce Forward Hamilton & Scripps LLP 600 West Broadway, Suite 2600 San Diego, CA 92101 TELEPHONE NO.: 619.236.1414 FAX NO.: 619.232.8311 ATTORNEY FOR (Name): Defendant Allstate Indemnity Company	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO ☐ COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814 ☐ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827 ☐ FAMILY COURT, 1501 6TH AVE., SAN DIEGO, CA 92101-3296 ☐ MADGE BRADLEY BLDG., 1409 4TH AVE., SAN DIEGO, CA 92101-3105 ☐ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081-6643 ☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941 ☐ RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200 ☑ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649 ☐ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792	
PLAINTIFF(S) Oralia Martinez	
DEFENDANT(S) Allstate Indemnity Company	JUDGE: William S. Cannon
IN THE MATTER OF A MINOR	DEPT: S-04
PEREMPTORY CHALLENGE **(CCP 170.6; Superior Court Rules, Division II, Rule 5.5)**	CASE NUMBER 37-2008-00069884-CU-IC-SC

Peter H. Klee, is ☐ a party ☑ an attorney for a party in the above-entitled case and declares that William S. Cannon, the Judge to whom this case is assigned, is prejudiced against the party or the party's attorney or the interests of the party or the party's attorney such that the said party or parties believe(s) that a fair and impartial trial or hearing cannot be had before such Judge.

WHEREFORE, pursuant to the provisions of §170.6 of the California Code of Civil Procedure, I respectfully request that this Court issue its order reassigning said case to another, and different, Judge for further proceedings.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 28, 2008

Peter H. Klee
(Signature)
Peter H. Klee, Esq.

ORDER OF THE COURT

☑ GRANTED ☐ DENIED

This case is referred to Presiding/Supervising Department for reassignment and a Notice will be mailed to counsel.

Dated: MAY 29 2008

WILLIAM S. CANNON
Judge of the Superior Court

FOR OFFICE USE ONLY

This case has been reassigned to Judge ____________ per Presiding/Supervising Judge ____________ on ____________.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

☐ CENTRAL, P.O. BOX 120128, 330 W. BROADWAY, SAN DIEGO, CA 92112-0128,
(619) 531-3141 (CIVIL) (619) 615-6358 (UNLAWFUL DETAINER)

☐ KEARNY MESA, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA. 92123-1187, (858) 694-2066

☐ NORTH COUNTY, 325 S. MELROSE DR., VISTA, CA 92083-6698, (760) 726-9595

☐ EAST COUNTY, 250 E. MAIN ST., EL CAJON, CA 92020-3941, (619) 441-4461

☐ RAMONA, 1428 MONTECITO RD., RAMONA, CA 92065-5201, (760) 738-2435

☒ SOUTH COUNTY, 500 3RD AVE., CHULA VISTA, CA 91910-5649, (619) 691-4439

CASE NUMBER:37-2008-00069884

We are unable to process the attachedMOTIONfor the reasons indicated below:

1. A $320 fee is now due and payable
2. Please use the attached pre-printed Preemptory Challenge form

Please return this form when you resubmit your document(s) and enclose a self-addressed envelope large enough for all documents, stamped with sufficient postage.

CLERK OF THE SUPERIOR COURT

Date: 05/27/08

By: C. Porter ,Clerk

☐ Checks Returned

Returned to ☐ Plaintiff ☐ Defendant ☒ Attorney via:Peter Klee via Cal Express

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
STREET ADDRESS: 500 Third Avenue
MAILING ADDRESS: 500 Third Avenue
CITY AND ZIP CODE: Chula Vista, CA 91910-5649
BRANCH NAME: South County
TELEPHONE NUMBER: (619) 746-6200

PLAINTIFF(S) / PETITIONER(S): Oralia Martinez

DEFENDANT(S) / RESPONDENT(S): Allstate Indemnity Company

MARTINEZ VS. ALLSTATE INDEMNITY COMPANY

NOTICE OF CASE TRANSMITTAL AND NOTICE OF RECEIPT OF TRANSFERRED CASE (CCP 339)	CASE NUMBER: 37-2008-00069884-CU-IC-SC

Notice is hereby given that the above entitled case was:

[X] Transferred on 6/5/2008 to San Diego - Central

[ ] Received and filed on ____________ after transfer from ______________________

New case number: ______________________

CLERK OF THE SUPERIOR COURT

Date: 06/05/2008

V. Carrillo, Deputy
Veronica Carrillo

SUPCT CIV-736 (Rev. 8-06) **NCT - NOTICE OF CASE TRANSMITTAL AND RECEIPT** Page: 1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

South County
500 Third Avenue
Chula Vista, CA 91910-5649

SHORT TITLE: Martinez vs. Allstate Indemnity Company

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2008-00069884-CU-IC-SC**

I certify that I am not a party to this cause. I certify that a true copy of the NOTICE OF CASE TRANSMITTAL AND NOTICE OF RECEIPT OF TRANSFERRED CASE (CCP 339) was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at Chula Vista, California, on 06/06/2008.

Clerk of the Court, by: V. Carrillo, Deputy

J MANUEL SANCHEZ
482 W. SAN YSIDRO BOULEVARD, SUITE 3
SAN YSIDRO, CA 92173

PETER H. KLEE
600 W BROADWAY STE 2600
SAN DIEGO, CA 92101

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

STREET ADDRESS: 330 W Broadway
MAILING ADDRESS: 330 W Broadway
CITY AND ZIP CODE: San Diego, CA 92101-3827
BRANCH NAME: Central
TELEPHONE NUMBER: (619) 450-7275

PLAINTIFF(S) / PETITIONER(S): Oralia Martinez

DEFENDANT(S) / RESPONDENT(S): Allstate Indemnity Company

MARTINEZ VS. ALLSTATE INDEMNITY COMPANY

NOTICE OF CASE TRANSMITTAL AND NOTICE OF RECEIPT OF TRANSFERRED CASE (CCP 339)	CASE NUMBER: 37-2008-00069884-CU-IC-CTL

Notice is hereby given that the above entitled case was:

☐ Transferred on ____________ to ______________________________

☒ Received and filed on 6/5/2008 after transfer from San Diego - South County

New case number: 37-2008-00069884-CU-IC-CTL

CLERK OF THE SUPERIOR COURT

Date: 06/16/2008

B.A. Williams
B. A. Williams
______________________, Deputy
Barbara Williams

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO Central 330 W Broadway San Diego, CA 92101-3827	
SHORT TITLE: Martinez vs. Allstate Indemnity Company	
CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2008-00069884-CU-IC-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the NOTICE OF CASE TRANSMITTAL AND NOTICE OF RECEIPT OF TRANSFERRED CASE (CCP 339) was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 06/17/2008.

Clerk of the Court, by: B. A. Williams, Deputy
B. A. Williams

J MANUEL SANCHEZ
482 W. SAN YSIDRO BOULEVARD, SUITE 3
SAN YSIDRO, CA 92173

✓ PETER H. KLEE
600 W BROADWAY STE 2600
SAN DIEGO, CA 92101

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 330 W Broadway MAILING ADDRESS: 330 W Broadway CITY AND ZIP CODE: San Diego, CA 92101-3827 BRANCH NAME: Central TELEPHONE NUMBER: (619) 746-8071	*FOR COURT USE ONLY* 06/16/2008
PLAINTIFF(S): Oralia Martinez	
DEFENDANT(S): Allstate Indemnity Company	
ORALIA MARTINEZ VS. ALLSTATE INDEMNITY COMPANY	
NOTICE OF CASE REASSIGNMENT	CASE NUMBER: 37-2008-00069884-CU-IC-CTL

Filed : 04/11/2008

EFFECTIVE IMMEDIATELY, THE ABOVE-ENTITLED CASE HAS BEEN REASSIGNED

to Judge Michael M. Anello, in Department C-72

due to the following reason: Peremptory Challenge filed by defendant Allstate Indemnity Company

All subsequent documents filed in this case must include the name of the new judge and the department number on the first page immediately below the number of the case. All counsel and self-represented litigants are advised that Division II of the Superior Court Rules is strictly enforced. It is the duty of each plaintiff (and cross-complainant) to serve a copy of this notice with the complaint (and cross-complaint).

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 W Broadway
San Diego, CA 92101-3827

SHORT TITLE: Martinez vs. Allstate Indemnity Company

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2008-00069884-CU-IC-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the NOTICE OF CASE REASSIGNMENT was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 06/17/2008.

Clerk of the Court, by: G. Marchesano, Deputy

J MANUEL SANCHEZ
482 W. SAN YSIDRO BOULEVARD, SUITE 3
SAN YSIDRO, CA 92173

PETER H. KLEE
600 W BROADWAY STE 2600
SAN DIEGO, CA 92101

SUPERIOR COURT OF CALIFORNIA
SAN DIEGO COUNTY
330 W Broadway
San Diego, CA 92101-3827

ADDRESS FORWARD REQUESTED

384.CRT37-20080617.S11

PETER H. KLEE
600 W BROADWAY STE 2600
SAN DIEGO, CA 92101

J. Manuel Sanchez, Esq. State Bar No. 74994
J. MANUEL SANCHEZ & ASSOCIATES
Attorneys at Law
482 W. San Ysidro Boulevard, Suite 3
San Ysidro, California 92173
Tel: (619) 662-2080
Fax: (619) 662-2048

Attorneys for Plaintiff Oralia Martinez

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CENTRAL JUDICIAL DISTRICT

ORALIA MARTINEZ, Plaintiff, v. ALLSTATE INDEMNITY COMPANY, DOES 1 through 50, inclusive, Defendants.	CASE NO. 37-2008-00 JOINT STIPULATION TO "STAY" ALL DISCOVERY PENDING DEPOSITIONS OF PERCIPIENT WITNESSES

JOINT STIPULATION TO "STAY" ALL DISCOVERY PENDING DEPOSITIONS OF PERCIPIENT WITNESSES

The Parties, through their respective Attorneys of Record, hereby stipulate to momentarily "STAY" ALL DISCOVERY until the taking of Depositions for three percipient witnesses are completed.

At which time, if an early resolution of the case is not attained, the Plaintiff will have 14 days to respond to the Defendants' Form Interrogatories, Special Interrogatories, and Request for Production of Documents dated May 28, 2008.

///

///

///

///

DATED: June 8, 2008

J. Manuel Sanchez, Esq.
Attorney for Plaintiff

DATED: June __, 2008

John D. Edson, Esq.
Attorney for Defendants

Peter H. Klee, State Bar No. 111707
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

Attorneys for Defendant Allstate Indemnity Company

FILED
Clerk of the Superior Court
JUN 23 2008
By: ________ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO – CENTRAL DISTRICT

ORALIA MARTINEZ ,

Plaintiff,

v.

ALLSTATE INDEMNITY COMPANY,

Defendant.

Case No. 37-2008-00069884-CU-IC-SC

ALLSTATE'S AMENDED NOTICE OF DEMURRER AND DEMURRER TO PORTIONS OF PLAINTIFF'S COMPLAINT
[Code Civ. Proc. § 430.10 *et seq.*]

Date: August 15, 2009
Time: 1:30 pm
Judge: Michael M. Anello
Dept.: 72
Comp. Filed: April 11, 2008

TO PLAINTIFF AND HER ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that the prior demurrer hearing has been vacated and the case has been reassigned to the above-referenced court. On August 15, 2008 at 1:30 p.m. in Department 72 of the above-referenced Court located at 330 West Broadway, San Diego, California 92101, defendant Allstate Insurance Company will and hereby does demurrer to portions of the complaint pursuant to California Code of Civil Procedure section 430.10 *et seq.*

Martinez's third cause of action for "unfair claim settlement practices" fails to state facts sufficient to constitute a cause of action against Allstate. Cal. Code Civ. Proc. § 430.10(e). The claim is also redundant with the second cause of action for breach of the implied covenant of good faith and fair dealing.

Martinez's fourth cause of action for injunctive relief and restitution fails to state facts sufficient to constitute a cause of action against Allstate. Cal. Code Civ. Proc. § 431.10(e). In the alternative, the fourth cause of action is uncertain, ambiguous and unintelligible. Cal. Code Civ. Proc. § 430.10(f). The cause of action fails to identify a statute giving rise to the cause of action.

Martinez's fifth cause of action for "improper disclosure of confidential information" fails to state facts sufficient to constitute a cause of action against Allstate. Cal. Code Civ. Proc. § 430.10(e). In the alternative, the fifth cause of action is uncertain, ambiguous and unintelligible. Cal. Code Civ. Proc. § 430.10(f). The cause of action fails to identify a statute giving rise to the cause of action.

This demurrer is based upon this notice of demurrer and memorandum of points and authorities, Allstate's concurrently filed notice of foreign authorities, the reply brief, arguments raised a time of oral argument and any other matters that the Court may consider or take judicial notice of at or before the time of hearing on this motion.

DATED: June 23, 2008 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: ______________________
John D. Edson
Attorneys for Defendant
Allstate Insurance Company

101102091.1

FILED
Clerk of the Superior Court
JUN 23 2008
Deputy

PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 600 West Broadway, Suite 2600, San Diego, California 92101-3372.

On June 23, 2008, I served true copies of the following document(s) described as:

ALLSTATE'S AMENDED NOTICE OF DEMURRER AND DEMURRER TO PORTIONS OF PLAINTIFF'S COMPLAINT

on the interested parties in this action as follows:

J. Manuel Sanchez, Esq.
J. MANUEL SANCHEZ & ASSOCIATES
482 W. San Ysidro Boulevard, Suite 3
San Ysidro, CA 92173
Tel: (619) 662-2080
Fax: (619) 662-2048

Attorneys for Plaintiff Oralia Martinez

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Luce, Forward, Hamilton & Scripps LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY FAX TRANSMISSION:** I faxed a copy of the document(s) to the persons at the fax numbers listed in the Service List. The telephone number of the sending facsimile machine was 619.232.8311. No error was reported by the fax machine that I used.

☐ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address cwiles@luce.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 23, 2008, at San Diego, California.

Cheryl Wiles
CHERYL WILES

101089938.1

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, sta[illegible]mber, and address)*:
J. MANUEL SANCHEZ, ESQ. 74994
J. MANUEL SANCHEZ & ASSOCIATES
482 W. SAN YSIDRO BLVD., SUITE 3
SAN YSIDRO, CA 92173
TELEPHONE NO.: (619) 662-2080 FAX NO.: (619) 662-2048
ATTORNEY FOR *(Name)*: ORALIA MARTINEZ

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

- [ ] COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814
- [X] HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827
- [ ] FAMILY COURT, 1501 6TH AVE., SAN DIEGO, CA 92101-3296
- [ ] MADGE BRADLEY BLDG., 1409 4TH AVE., SAN DIEGO, CA 92101-3105
- [ ] NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081-6643
- [ ] EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941
- [ ] RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200
- [ ] SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649
- [ ] JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792

PLAINTIFF(S) ORALIA MARTINEZ

DEFENDANT(S) ALLSTATE INDEMNITY COMPANY

JUDGE: Michel M. Anello

IN THE MATTER OF

A MINOR

DEPT: C-72

PEREMPTORY CHALLENGE
(CCP 170.6; Superior Court Rules, Division II, Rule 5.5)

CASE NUMBER
37-2008-00069884-CU-IC-

ORALIA MARTINEZ , is [X] a party [ ] an attorney for a party in the above-entitled case and declares that HONORABLE MICHAEL M. ANELLO , the Judge to whom this case is assigned, is prejudiced against the party or the party's attorney or the interests of the party or the party's attorney such that the said party or parties believe(s) that a fair and impartial trial or hearing cannot be had before such Judge.

WHEREFORE, pursuant to the provisions of § 170.6 of the California Code of Civil Procedure, I respectfully request that this Court issue its order reassigning said case to another, and different, Judge for further proceedings.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 6/23/08

Oralia Martinez
(SIGNATURE)

ORDER OF THE COURT

[ ] GRANTED [ ] DENIED

This case is referred to Presiding/Supervising Department for reassignment and a Notice will be mailed to counsel.

Dated:

JUDGE OF THE SUPERIOR COURT

FOR OFFICE USE ONLY

This case has been reassigned to Judge **per Presiding/Supervising Judge**
on

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, street number, and address):
J. MANUEL SANCHEZ, ESQ. 74994
J. MANUEL SANCHEZ & ASSOCIATES
482 W. SAN YSIDRO BLVD., SUITE 3
SAN YSIDRO, CA 92173
TELEPHONE NO.: (619) 662-2080 FAX NO.: (619) 662-2048
ATTORNEY FOR (Name): ORALIA MARTINEZ

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

- ☐ COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814
- ☒ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827
- ☐ FAMILY COURT, 1501 6TH AVE., SAN DIEGO, CA 92101-3296
- ☐ MADGE BRADLEY BLDG., 1409 4TH AVE., SAN DIEGO, CA 92101-3105
- ☐ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081-6643
- ☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941
- ☐ RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200
- ☐ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649
- ☐ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792

PLAINTIFF(S) ORALIA MARTINEZ

DEFENDANT(S) ALLSTATE INDEMNITY COMPANY

JUDGE: Michel M. Anello

IN THE MATTER OF

A MINOR

DEPT: C-72

PEREMPTORY CHALLENGE
(CCP 170.6; Superior Court Rules, Division II, Rule 5.5)

CASE NUMBER
37-2008-00069884-CU-IC-

ORALIA MARTINEZ , is ☒ a party ☐ an attorney for a party in the above-entitled case and declares that HONORABLE MICHAEL M. ANELLO , the Judge to whom this case is assigned, is prejudiced against the party or the party's attorney or the interests of the party or the party's attorney such that the said party or parties believe(s) that a fair and impartial trial or hearing cannot be had before such Judge.

WHEREFORE, pursuant to the provisions of § 170.6 of the California Code of Civil Procedure, I respectfully request that this Court issue its order reassigning said case to another, and different, Judge for further proceedings.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 6/23/08

Oralia Martinez
(SIGNATURE)

ORDER OF THE COURT

☐ GRANTED ☐ DENIED

This case is referred to Presiding/Supervising Department for reassignment and a Notice will be mailed to counsel.

Dated:

JUDGE OF THE SUPERIOR COURT

FOR OFFICE USE ONLY

This case has been reassigned to Judge **per Presiding/Supervising Judge**
on

J. Manuel Sanchez & Associates
Attorneys at Law
482 W. San Ysidro Blvd. Suite 3
San Ysidro, California 92173

SAN DIEGO CA
24 JUN 08 PM

USA 41

Peter H. Lee, Esq.
600 West Broadway, #2600
San Diego CA 92101-1444
92101

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO	*FOR COURT USE ONLY*
STREET ADDRESS: 330 West Broadway MAILING ADDRESS: 330 West Broadway CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central TELEPHONE NUMBER: (619) 450-7072	06/30/2008
PLAINTIFF(S) : Oralia Martinez	
DEFENDANT(S) : Allstate Indemnity Company	
ORALIA MARTINEZ VS. ALLSTATE INDEMNITY COMPANY	
NOTICE OF CASE REASSIGNMENT	CASE NUMBER: 37-2008-00069884-CU-IC-CTL

Filed : 04/11/2008

EFFECTIVE IMMEDIATELY, THE ABOVE-ENTITLED CASE HAS BEEN REASSIGNED

to Judge Ronald S. Prager, in Department C-71

due to the following reason: Peremptory Challenge

All subsequent documents filed in this case must include the name of the new judge and the department number on the first page immediately below the number of the case. All counsel and self-represented litigants are advised that Division II of the Superior Court Rules is strictly enforced. It is the duty of each plaintiff (and cross-complainant) to serve a copy of this notice with the complaint (and cross-complaint).

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Martinez vs. Allstate Indemnity Company

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2008-00069884-CU-IC-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the NOTICE OF CASE REASSIGNMENT was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 07/01/2008.

Clerk of the Court, by: J. Lizama
J. Lizama, Deputy

J MANUEL SANCHEZ
482 W. SAN YSIDRO BOULEVARD, SUITE 3
SAN YSIDRO, CA 92173

PETER H. KLEE
600 W BROADWAY STE 2600
SAN DIEGO, CA 92101

SUPERIOR COURT OF CALIFORNIA
SAN DIEGO COUNTY
330 West Broadway
San Diego, CA 92101

ADDRESS FORWARD REQUESTED

304.CRT37-20080701.S11

PETER H. KLEE
600 W BROADWAY STE 2600
SAN DIEGO, CA 92101

Peter H. Klee, State Bar No. 111707
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
Telephone No.: 619.236.1414
Fax No.: 619.232.8311

FILED
CIVIL BUSINESS OFFICE
CENTRAL DIVISION
JUL 09 2008
CLERK - SUPERIOR COURT
SAN DIEGO COUNTY, CA

Attorneys for Defendant Allstate Indemnity Company

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO – CENTRAL DISTRICT

ORALIA MARTINEZ ,

Plaintiff,

v.

ALLSTATE INDEMNITY COMPANY,

Defendant.

Case No. 37-2008-00069884-CU-IC-SC

ALLSTATE'S SECOND AMENDED NOTICE OF DEMURRER AND DEMURRER TO PORTIONS OF PLAINTIFF'S COMPLAINT [Code Civ. Proc. § 430.10 *et seq.*]

Date:	October 3, 2008
Time:	10:00 am
Judge:	Ronald S. Prager
Dept.:	71
Comp. Filed:	April 11, 2008

TO PLAINTIFF AND HER ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that the prior demurrer hearings have been vacated and the case has been reassigned to the above-referenced judge. On October 3, 2008 at 10:00 a.m. in Department 71 of the above-referenced Court located at 330 West Broadway, San Diego, California 92101, defendant Allstate Insurance Company will and hereby does demurrer to portions of the complaint pursuant to California Code of Civil Procedure section 430.10 *et seq.*

Martinez's third cause of action for "unfair claim settlement practices" fails to state facts sufficient to constitute a cause of action against Allstate. Cal. Code Civ. Proc. § 430.10(e). The claim is also redundant with the second cause of action for breach of the implied covenant of good faith and fair dealing.

Martinez's fourth cause of action for injunctive relief and restitution fails to state facts sufficient to constitute a cause of action against Allstate. Cal. Code Civ. Proc. § 431.10(e). In the alternative, the fourth cause of action is uncertain, ambiguous and unintelligible. Cal. Code Civ. Proc. § 430.10(f). The cause of action fails to identify a statute giving rise to the cause of action.

Martinez's fifth cause of action for "improper disclosure of confidential information" fails to state facts sufficient to constitute a cause of action against Allstate. Cal. Code Civ. Proc. § 430.10(e). In the alternative, the fifth cause of action is uncertain, ambiguous and unintelligible. Cal. Code Civ. Proc. § 430.10(f). The cause of action fails to identify a statute giving rise to the cause of action.

This demurrer is based upon this notice of demurrer and memorandum of points and authorities, Allstate's concurrently filed notice of foreign authorities, the reply brief, arguments raised a time of oral argument and any other matters that the Court may consider or take judicial notice of at or before the time of hearing on this motion.

DATED: July 09, 2008 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: [signature]
D. Edson
Attorneys for Defendant
Allstate Insurance Company

101105017.1

PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 600 West Broadway, Suite 2600, San Diego, California 92101-3372.

On July 9, 2008, I served true copies of the following document(s) described as:

- **ALLSTATE'S SECOND AMENDED NOTICE OF DEMURRER TO PORTIONS OF PLAINTIFF'S COMPLAINT**

on the interested parties in this action as follows:

J. Manuel Sanchez, Esq.
J. MANUEL SANCHEZ & ASSOCIATES
482 W. San Ysidro Boulevard, Suite 3
San Ysidro, CA 92173
Tel: (619) 662-2080
Fax: (619) 662-2048

Attorneys for Plaintiff Oralia Martinez

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Luce, Forward, Hamilton & Scripps LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY FAX TRANSMISSION:** I faxed a copy of the document(s) to the persons at the fax numbers listed above. The telephone number of the sending facsimile machine was 619.232.8311. No error was reported by the fax machine that I used.

☐ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 9, 2008, at San Diego, California.

Cheryl Wiles

CHERYL WILES

101089938.1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

STREET ADDRESS:	330 West Broadway
MAILING ADDRESS:	330 West Broadway
CITY AND ZIP CODE:	San Diego, CA 92101
BRANCH NAME:	Central
TELEPHONE NUMBER:	(619) 450-7071

PLAINTIFF(S) / PETITIONER(S): Oralia Martinez

DEFENDANT(S) / RESPONDENT(S): Allstate Indemnity Company

MARTINEZ VS. ALLSTATE INDEMNITY COMPANY

NOTICE OF HEARING	CASE NUMBER: 37-2008-00069884-CU-IC-CTL

Notice is given that the above-entitled case has been set for the reason listed below and at the location shown above. All inquiries regarding this notice should be referred to the court listed above.

TYPE OF HEARING	DATE	TIME	DEPT	JUDGE
Civil Case Management Conference	11/21/2008	01:15 pm	C-71	Ronald S. Prager

Counsel: Check service list. If you have brought a party into this case who is not included in the service list, San Diego Superior Court Local Rules, Division II, requires you to serve the party with a copy of this notice.

A case management statement must be completed by counsel for all parties or parties in pro per and timely filed with the court at least 15 days prior to the initial case management conference. (San Diego Local Rules, Division II, CRC Rule 212).

All counsel of record or parties in pro per shall appear at the Case Management Conference, be familiar with the case, and be fully prepared to participate effectively in the hearing, including discussions of ADR options.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Martinez vs. Allstate Indemnity Company

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2008-00069884-CU-IC-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the NOTICE OF HEARING was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 08/27/2008.

Clerk of the Court, by: D. Hernandez
D. Hernandez, Deputy

J MANUEL SANCHEZ
482 W. SAN YSIDRO BOULEVARD, SUITE 3
SAN YSIDRO, CA 92173

PETER H. KLEE
600 W BROADWAY STE 2600
SAN DIEGO, CA 92101

CIVIL COVER SHEET

ORIGINAL

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet (SEE INSTRUCTIONS ON PAGE TWO.)

I.(a) PLAINTIFFS
ORALIA MARTINEZ

DEFENDANTS
ALLSTATE INDEMNITY COMPANY

FILED
08 SEP -5 AM 10:55
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego, CA
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Cook County, IL
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

'08 CV 1630 BTM RBB

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
J. Manuel Sanchez, Esq.
J. Manuel Sanchez & Associates
482 W. San Ysidro Blvd., Suite 3
San Ysidro, CA 92173
(619) 662-2080

ATTORNEYS (IF KNOWN)
Peter H. Klee, Esq. (619) 236-1414
John D. Edson, Esq.
LUCE FORWARD HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, CA 92101

II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For diversity cases only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☒ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

☐ 1 Original Proceeding ☒ 2 Removed from State Court ☐ Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transfered from Another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

V. NATURE OF SUIT (PLACEAN "X" IN ONE BOX ONLY)

CONTRACT
- ☒ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury Med Malpractice
- ☐ 365 Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 RR& Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt Relations
- ☐ 730 Labor/Mgmt Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl.Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (US Plaintiff or Defendant
- ☐ 871 IRS-Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights
- ☐ 445 Amer w/ disab- Empl
- ☐ 446 Amer w/ disab –Other
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Satellite TV

PRISONER PETITIONS
- ☐ 510 Motion to Vacate Sentence Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)
28 USCA # 1441
Complaint for Damages for: Breach of Contract, Breach of Implied Covenant of Good Faith & Fair Dealing, Injunctive Relief

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P.23
DEMAND$ 1,000,000.00
CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ YES ☒ NO

VIII. RELATED CASE(S) IF ANY
PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)
☐ SAN FRANCISCO/OAKLAND ☐ SAN JOSE

DATE September 5, 2008 SIGNATURE OF ATTORNEY OF RECORD

#154713 GAC 9/5/08 $350

American LegalNet, Inc.
www.USCourtForms.com

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-44

Authority For Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs - Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a). F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS-44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

V. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section IV above, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause.

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS-44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases. Date and Attorney Signature.

Date and Attorney Signature. Date and sign the civil cover sheet.

American LegalNet, Inc.
www.USCourtForms.com

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

# 154713 - TC
*** * C O P Y * ***
September 05, 2008
10:57:06

Civ Fil Non-Pris
USAO #.: 08CV1630
Judge..: BARRY T MOSKOWITZ
Amount.: $350.00 CK
Check#.: BC208092

Total-> $350.00

FROM: ORALIA MARTINEZ
VS
ALL STATE INDEMNITY